Supreme Court, U.S.
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No. 03-03 325 AUG 19 2003

IN THE

Supreme Court of the United States

ANDREAS GAL, NORMAN H. HALPER and OLIVER LAZARE, as Executors of the Estate of PAUL LAZARE, and PANEX CO.,

Petitioners,

v.

DEAN C. PLASKETT, as Trustee for the Natural Resources of the Territory of the Virgin Islands, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT L. TOFEL
Counsel of Record
MARK A. LOPEMAN
TOFEL & PARTNERS, P.C.
Attorneys for Petitioners
780 Third Avenue
New York, New York 10017
(212) 752-0007

182429

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Was it error for the Court of Appeals, in a "Precedential" determination which conflicts with the Federal Rules of Civil Procedure and standards of review consistently articulated and followed by other circuit courts, to affirm the district court's formal findings of fact and conclusions of law, entered without a trial or evidentiary hearing, because they met a new and unprecedented standard enunciated by the Court of Appeals, that said findings were "fair, reasonable and consistent with the public interest"?

2. Did the Court of Appeals' affirmance of the district court's entry of findings of fact in disregard of the principle that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings, violate petitioners' due process rights under the U.S. Constitution?

3. Was it error for the Court of Appeals to affirm the district court's entry of findings of fact (and conclusions of law) that purport to resolve substantive, disputed factual issues which were irrelevant to the approval of the consent decree, but material to the disposition of unsettled claims which remain pending before the district court, without that court following procedures set forth in the Federal Rules of Civil Procedure, and without conducting a trial or evidentiary hearing?

4. Did the Court of Appeals err by failing to review the district court's "conclusions of law" under a "*de novo*" standard of review?

PARTIES TO THE PROCEEDINGS

Petitioners are Andreas Gal, an individual, Norman H. Halper and Oliver Lazare as Executors of the Estate of Paul Lazare ("the Lazare Estate") and Panex Co. (a former New York general partnership whose partners were Gal and Lazare). Petitioners are former third-party defendants in the first of the two lawsuits here, *In re: Tutu Water Wells CERCLA Litigation*, Master Docket No. 1989-107-1227, Civil No. 1996-0054(B) (U.S.D.C. D.V.I.), a consolidated litigation involving common-law claims by Virgin Islands residents and businesses for damages, and third-party claims for cost-recovery and contribution under CERCLA (the "*Tutu Wells* litigation"). Petitioners also are among the defendants in the second, separate and not-consolidated, litigation, *Commissioner of the Department of Planning and Natural Resources et ano. v. Esso Standard Oil, S.A. Ltd., et al.*, No. 1998/206 (U.S.D.C. D.V.I.), in which the plaintiff-Trustee, suing on behalf of the Virgin Islands, seeks recovery for alleged damages to natural resources (the "NRD Action"). Both actions involve claims arising from alleged contamination of the aquifer in the Tutu Wells region of St. Thomas, U.S.V.I.

Respondents include, principally, the plaintiff in the NRD Action, Dean C. Plaskett in his capacity as Trustee for Natural Resources of the Territory of the Virgin Islands (the "NRD Trustee").

Subsequent to the argument of their appeal to the Court of Appeals herein, petitioners settled all their *Tutu Wells* litigation claims and exchanged releases with various other putative respondents, including Esso Standard Oil, S.A., Ltd., Esso Virgin Islands, Inc., Esso Standard Oil Company (Puerto

Rico), Texaco Caribbean, Inc., and Texaco Puerto Rico (collectively, the "Oil Companies"), all of which had been third-party plaintiffs asserting CERCLA claims against petitioners for contribution and indemnity. Said putative respondents were co-defendants (with petitioners) in the NRD Action.

Other parties include the Successor Panex Industries, Inc. Stockholders' Liquidating Trust and its Trustee, Michael D. DeBaecke, Esq. (the "Successor Panex Trust"), also parties to the aforesaid *Tutu Wells* litigation settlement, and, like petitioners, still defendants in the NRD Action, and, L'Henri, Inc. ("L'Henri"), a former third-party plaintiff and defendant in the *Tutu Wells* litigation and a defendant in the NRD Action.

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Petitioners respectfully petition this Court for a writ of certiorari to review so much of the April 8, 2003 decision of the United States Court of Appeals for the Third Circuit (the "Court of Appeals"), and the mandate thereof, as affirmed the entry of findings of fact and conclusions of law of the U.S. District Court for the Virgin Islands, following procedures which are inconsistent with and contrary to the Federal Rules of Civil Procedure and in violation of petitioners' due process rights.

OPINIONS BELOW

The Court of Appeals' Opinion (Appendix A, 1a-14a) as expressly intended by the Court of Appeals, is reported at 326 F.3d 201. It affirmed the district court's (unreported) October 15, 2001 Memorandum Opinion and Order (Appendix B, 15a-73a) approving a consent decree settling claims between the NRD Trustee, the Oil Companies, and the Virgin Islands Government, in the *Tutu Wells* litigation and in the NRD Action. Remaining claims in the *Tutu Wells* litigation have since been settled, but the NRD Trustee's action against petitioners and others continues. Petitioners do not here contest the approval of the consent decree, *per se*, but, for the reasons set forth below, have objected to and continue to object to the district court's entry of findings of fact, many of which were in material dispute, and conclusions of law, which go well beyond any issue in respect of the consent decree and which have potentially continuing effect on the remaining issues in the NRD Action.[1]

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1. Other decisions in the *Tutu Wells* litigation, not directly related to this appeal, are reported at: 189 F.R.D. 153; 994 F. Supp. 638; 120 F.3d 368 (reversing in part and affirming in part 166 F.R.D. 331, 162 F.R.D. 81 and 162 F.R.D. 46); 74 F.3d 1228 (reversing 885 F. Supp. 776); 909 F. Supp. 980, 991, 999 and 1005; 164 F.R.D. 41; 157 F.R.D. 367 and 846 F. Supp. 1243.

JURISDICTIONAL STATEMENT

The Court of Appeals decision was entered on April 8, 2003. Petitioners filed a timely petition for rehearing on May 5, 2003, which the Court of Appeals denied on May 21, 2003 (Appendix C; 74a-75a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The district court's "Findings of Fact" and "Conclusions of Law" did not comport with, and were not entered under or pursuant to, Rule 52(a) of the Federal Rules of Civil Procedure, which provides in pertinent part:

> Rule 52. Findings by the Court; Judgment on Partial Findings.
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . Findings of fact and conclusions of law are unnecessary on

> decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

The district court's comments (*see, infra*, at 9-10) to the contrary notwithstanding, the motion before the district court and in respect of which it entered the subject findings of fact, was not one for summary judgment, and the provisions of Rule 56(d) of the Federal Rules of Civil Procedure with respect to findings of undisputed fact, also have no application here:

> Rule 56. Summary Judgment
>
> . . .
>
> (d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy . . .

STATEMENT OF THE CASE

The Court of Appeals decision affirming the district court's approval of a non-dispositive partial settlement of the NRD Action, and its unnecessary entry of wide-ranging findings of fact (and conclusions of law) on numerous issues which have been and still are the subject of continuing and active material

disputes in the NRD Action, is in clear conflict with the Federal Rules of Civil Procedure, constitutes a departure from well-recognized and fundamental principles of justice and conflicts with the published decisions of other circuit courts of appeal. Nowhere do the Rules purport to authorize such findings. Moreover, the entry of such findings and conclusions without an evidentiary hearing violated petitioners' due process rights. The new, non-evidentiary standard announced by the Court of Appeals (expressly intended by it to have "precedential" effect; App. 15a) for entry of findings of fact (findings of fact may be entered when they are "fair, reasonable and consistent with the public interest" without reference to what evidence, if any, supports them; App. 13a-14a) is in conflict with the Federal Rules and with the standards for entry of findings of fact previously followed by the Third Circuit and adhered to by courts of appeal for the various other circuits.[2]

The district court erred when under the guise of ruling on a motion seeking approval of a settlement, it unnecessarily and

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2. *See Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (trial court should not resolve disputed issues of fact or law that underlie the merits under the guise of a settlement or fairness hearing); *Anderson v. Davila*, 125 F.3d 148, 158 (3d Cir. 1997); *Hartford-Empire Co. v. Shawkee Mfg. Co.*, 147 F.2d 532, 535 (3d Cir. 1944). When reviewing findings of fact in the context of a consent decree, the standard for review followed by all other circuits is "clearly erroneous", not the "fair, reasonable, and consistent" standard for review of the consent decree itself. *See Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003); *United States v. Davis*, 261 F.3d 1, 37 (1st Cir. 2001); *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1995); *United States v. Colorado & Eastern R. Co*, 50 F.3d 1530, 1538 (10th Cir. 1995).

In this case, the Court of Appeals never reviewed the findings under either a "clearly erroneous" or any other recognized appellate standard.

with neither appropriate notice nor appropriate hearing, punished petitioners for their opposition to the settlement approval motion. The district court did that when it entered 170 findings of fact, and 91 conclusions of law, most of which are unrelated to the settlement being approved, are adverse to petitioners and purport to "find" facts that are simply untrue, unsupported by any evidence, contradicted by evidence of record and have been and still are the subject of vigorous dispute in the litigation still pending in the district court.[3]

The Court of Appeals compounded that error when it not only affirmed the district court's approval of the settlement, but also affirmed and approved the district court's entry of the findings, incorrectly concluding that the district court is empowered and permitted to make findings of fact under any procedural circumstance whatever, so long as the findings are "fair, reasonable and consistent with the public interest". What this petition for certiorari is all about is the violation by the district court and by the Court of Appeals of "a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings".[4] It was not enough for either the district court or

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3. The district court and the Court of Appeals have suggested that petitioners could have submitted "competing documents, testimony or analysis . . . to support their criticism of the settling Parties evidence. . . ." (App. 12a-13a) Petitioners made it clear that the so-called "evidence" required sworn testimony from those propounding it, without which it was not "evidence" at all or was, at best, evidence in dispute. There was not a single sworn statement before the district court on the subject — not orally or in the form of an affidavit — and many of the facts as found, are false.

4. *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001).

the Court of Appeals to stop the inquiry after concluding that findings were "fair, reasonable and consistent, [etc.]" when there was no adherence to any procedures permitting a determination that any of those findings were also **true**.

I. Proceedings In The District Court.

The district court's October 15, 2001 Memorandum Opinion and Order (Appendix B; 15a-73a) comprised 170 findings of fact and 91 conclusions of law, approving a settlement and a consent decree between some but not all of the parties in two related but separate non-consolidated cases. Both cases arise from alleged environmental contamination of the Tutu Aquifer in St. Thomas, U.S. Virgin Islands.[5]

In the now fully settled *Tutu Wells* litigation, originally commenced in 1989, the Oil Companies asserted claims against other allegedly CERCLA-liable parties, including petitioners and the Virgin Islands Government Department of Education ("DOE"). The costs and expenses for which the Oil Companies sought recovery were allegedly incurred in responding to the aforesaid alleged environmental impairment. The parties generally counterclaimed and cross-claimed against each other for indemnity and/or contribution under CERCLA; those claims were finally settled in November, 2002.

In the later NRD Action commenced in 1998, the NRD Trustee seeks to recover under CERCLA from the aforesaid Oil Companies, petitioners, and others, for alleged damages to

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5. The district court had subject matter jurisdiction over all claims arising under CERCLA (42 U.S.C. § 9601, *et seq.*) in both actions pursuant to 42 U.S.C. §§ 9607(a) and 9613(b) and 28 U.S.C. § 1331 (federal question jurisdiction).

natural resources arising from the aforesaid alleged environmental impairment.

The Order resulted from an October, 2000 motion (A1213) seeking approval of a consent decree settling those claims between the Oil Companies, the Virgin Islands government and the NRD Trustee in both the *Tutu Wells* litigation and the NRD Action. The consent decree provided for the Oil Companies' payment of the net amount of $8.9 million to the Virgin Islands general treasury. That motion for approval was not supported by a sworn or attested statement of any kind. Neither were the reports or other submissions verified or authenticated by their authors, even by affidavits. Petitioners filed written opposition to that motion (A2015). No discovery of any kind had been conducted in the NRD Action, which had been stayed almost since its inception because of a pending motion to disqualify the NRD Trustee's counsel.

Petitioners had previously (in April, 2000) filed a motion for summary judgment in the *Tutu Wells* litigation, claiming that on the undisputed facts, and under the authority of *United States v. Bestfoods*, 524 U.S. 51 (1998), they were not and could not be liable as "operators" under CERCLA. The principles of both motions are fully applicable, *mutatis mutandis*, to the claims made against petitioners in the NRD action.

Argument of the summary judgment motions in the *Tutu Wells* litigation was repeatedly postponed, and, over petitioners' objections, ultimately was rescheduled to be held on the same day as argument of the motion to approve the consent decree.

On February 1, 2001, the district court wrote to "All attorneys of record" (A2063) stating:

> On February 14, 2001, the Court will entertain argument on the motions for Summary Judgment and the Consent Decree."

At no time did any party request, nor the district court order, an evidentiary hearing.

Thus it was that petitioners' counsel expressed surprise as that oral argument began, on February 14, 2001, to see the NRD Trustee's counsel bring into the courtroom audiovisual equipment and other things not routinely used in the argument of summary judgment and other motions (A2158-9). It appeared that the NRD Trustee's counsel was preparing to go beyond the voluminous documents theretofore submitted in support of the approval motion. Petitioners' counsel objected, and asked, before any argument had commenced, that the proceeding be adjourned to schedule a *bona-fide* hearing if the court was going to take additional, theretofore unsubmitted, documents. That request was denied (A2167).

The district court then proceeded to hear argument on the motion to approve the settlement as it might have considered any ordinary motion, based solely on the parties' memoranda and exhibits (no affidavits were offered by any party) and oral arguments.[6] No evidentiary hearing was conducted; no witnesses were sworn; no testimony was offered or taken; there was no cross-examination.

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6. Over the objection of petitioners' counsel, the NRD Trustee's counsel was permitted to hand up five new, previously unsubmitted, exhibits during the argument. A2180; 2243-79.

Nevertheless, at the close of oral argument, not before, the NRD Trustee's counsel asked permission to submit proposed "findings of fact and conclusions of law". Petitioners objected to that request for the reason, *inter alia*, that no evidentiary hearing had been held. The district court granted the NRD Trustee's request (A2338-2340), at the same time unreasonably faulting petitioners for not joining issue, in the context of the motion to approve the settlement, in the battle over who really polluted the Tutu aquifer. Petitioners' counsel objected to the submission of proposed findings of fact in that procedural context, but the district court missed the point:

> The Court: Counsel, if you didn't present evidence I did not foreclose you from doing that. I don't see why you would now object to not — evidence not being presented. That's a problem —
>
> [Petitioners' Counsel]: The only evidence I've seen is exhibits to a motion.
>
> The Court: I'm saying if there was none ever presented by you that is a decision you made and a decision that you're stuck with. I did not foreclose you from presenting any type of evidence. None.
>
> [Petitioners' Counsel]: Your Honor, we understood we were here to argue a motion. I would have expected it to be inappropriate to deal with it as an evidentiary hearing and no one suggested to us that's what it was.

> The Court: That's not my first year law school understanding of summary judgment.[7]

A2239-2240.

The NRD Trustee submitted extensive proposed findings of fact and conclusions of law, to which petitioners and the Successor Trustee objected (A2282-2363).

In its October 15, 2001 Memorandum Opinion and Order (A5) the district court approved the consent decree (A1218) and, with one immaterial exception, adopted *verbatim* the NRD Trustee's proposed findings of fact and conclusions of law (A2282). Those findings and conclusions went well beyond the issues of consent decree validity, and could impact directly on all future proceedings in the NRD Action, including the trial thereof.

In opinions dated September 5 and December 4, 2001, the district court denied the summary judgment motions, which had also been argued on February 14, 2001. In those decisions, the district court expressly held that the existence of disputed issues of material fact in respect of many of the very same "facts" that it had adopted in its findings approving the consent decree, precluded summary judgment.

On October 30, 2001, petitioners filed their motion to reconsider the Order; that motion remains pending and undecided.

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7. In fact, petitioners had put before the district court, thousands of pages of documents and deposition testimony in support of their motion for summary judgment, to show, *inter alia*, that they were not operators under CERCLA.

II. Proceedings In The Court of Appeals.

Petitioners timely filed their notice of appeal from the district court's decision (which the district court denominated a "final judgment" and certified for appeal pursuant to Fed. R. Civ. P. 54(b); App. 72a). The appeal was fully briefed and argued, petitioners objecting separately to both the district court's approval of the settlement and Consent Decree, *per se*, and to its entry of findings of fact and conclusions of law without an appropriate procedural basis, and also on the ground that many of those findings and conclusion were and are false, unsupported by evidence and contrary to such "evidence" as does exist in the record.

Most of the Court of Appeals' Opinion discusses its affirmance of the district court's approval of the settlement. *See* App. 2a-11a. The court dealt with the important issue of whether the district court's findings of fact and conclusions of law were appropriately entered only in a brief section near the end of its Opinion (App. 13a-14a). While the court did correctly note that no evidentiary hearing was held (App. 11a-12a), it nevertheless concluded, without precedent of any kind, that the district court may enter such findings of fact — even without appropriate notice and without any evidentiary hearing — so long as they are "fair, reasonable and consistent with the public interest". (App. 13a-14a) The court engaged in no independent review of the district court's conclusions of law.

Petitioners filed a petition for rehearing which was narrowly addressed to the Court of Appeals' error in affirming entry of the findings and its expression of an inappropriate and unprecedented standard purportedly governing entry of such findings. The Court of Appeals denied that petition for rehearing on May 21, 2003. (App. 74a)

REASONS FOR GRANTING THE PETITION

The Court of Appeals' affirmance of the district court's entry of "findings of fact and conclusions of law" carries with it consequences unfair to appellants (and others) and unrelated to the consent decree approval *per se*. The Court of Appeals distorted petitioners' argument regarding the findings, and articulated, as the rationale for its decision, a new, dangerous, and heretofore-unknown legal principle, i.e., that a district court can make factual findings in the absence of any evidence to support them (even when, as in this case, they are false and flatly contradicted by the record in the action), if such findings are "fair, reasonable, and consistent with the public interest." Such a standard is nowhere to be found in the Federal Rules of Civil Procedure, or in prior case law. Moreover, it conflicts with existing precedent in other circuits. Surely, this Orwellian standard is not the correct legal standard for the entry of findings of fact.

The Court of Appeals conflated the issue of whether the consent decree should have been approved, with the very separate question of whether the findings were appropriately entered.[8] Only having so mistakenly fused those issues could the Court of Appeals have concluded that findings that are "fair, reasonable and in the public interest" may be entered without any reference to their truth or falsity, or without, at a minimum, considering whether the "evidence" of record supports those findings (which it does not).

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8. The well-settled standard for determination of a motion to approve a CERCLA consent decree is that such motion should be granted whenever the proposed consent decree and the settlement embodied therein, are "fair, reasonable, and consistent with CERCLA's goals". App. 7a, *citing United States v. Southeastern Pennsylvania Transp. Authority*, 235 F.3d 817, 823 (3d Cir. 2000).

This Court should reexamine the standard for entry of findings of fact. As petitioners noted in their briefs in the Court of Appeals, on a summary judgment motion (which this was not), findings of fact may only be entered as to facts in respect of which there is no material dispute.[9] In federal court motion practice generally, and in this case specifically, in the absence of any trial or evidentiary hearing (which could have provided a basis for entry of findings under Fed. R. Civ. P. 52), the same standard should apply. The district court exceeded its authority by purporting to resolve material factual issues that were and are in dispute.[10]

Indeed, it appears to petitioners (and, it has not been demonstrated otherwise by respondents, the district court or the Court of Appeals) that the Federal Rules explicitly permit the entry of "findings of fact" by a district court **only** (i) after a trial or evidentiary hearing, pursuant to Fed. R. Civ. P. 52, or (ii) in ruling on a fully-briefed and argued summary judgment motion, and then only after "interrogating counsel" to "ascertain what material facts exist without substantial controversy" (Fed. R. Civ. P. 56(d)). It is not and cannot be disputed that no such procedure was either invoked or adhered to below, nor were those standards met in this case.[11]

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9. *See* appellants' reply brief at 7-8; Fed. R. Civ. P. 56(d); *Garter-Bare Co. v. Munsingwear, Inc.*, 650 F.2d 975, 980 (9th Cir. 1980).

10. *See Officers for Justice*, 688 F.2d at, 625 (trial court should not resolve disputed issues of fact or law that underlie the merits under the guise of a settlement or fairness hearing); *Anderson v. Davila*, 125 F.3d at 158; *Hartford-Empire Co. v. Shawkee*, 147 F.2d at 535.

11. Rule 52 also requires the entry of findings of fact and conclusions of law when granting interlocutory injunctions. Not surprisingly, no one has ever suggested that this provision applies

(Cont'd)

Even if some other or lesser standard were to apply, the "fair, reasonable and consistent with the public interest" rubric articulated by the Court of Appeals, unbound as it is by anything in the Federal Rules, and seemingly unfettered by prior precedent, raises a whole host of new problems for litigants. On an ordinary, non-dispositive motion, is the district court free to enter findings as to material, substantive and disputed issues if they are supported only by "substantial evidence", or by a

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(Cont'd)
in this case; any attempt to justify the findings in this case under that provision would be doomed to failure, for courts are universally required to hold an evidentiary hearing before granting such an order or decree. *Schultz v. Williams*, 38 F.3d 657 (2d Cir. 1994); *All-Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 887 F.2d 1535, 1538-9 (11th Cir. 1989); *Fireman's Fund Ins. Co. v. Leslie & Elliott Co., Inc.*, 867 F.2d 150 (2d Cir. 1989). In such cases, the evidentiary hearing would provide the proper procedural basis for the entry of findings.

If it were to be likened to an injunction at all, the consent decree (the order approving which was denominated by the district court as a "final judgment") would be more comparable to a permanent injunction — which may not be entered without a final determination on the merits and a full trial of those merits. *University of Texas v. Camenisch*, 451 U.S. 390, 394-398 (1981); *Atomic Oil Co. of Oklahoma, Inc. v. Bardahl Oil Co.*, 419 F.2d 1097, 1103, n.11 (10th Cir. 1969), *cert. denied*, 397 U.S. 1063, 90 S.Ct. 1500 (1970); *Chappell & Co. v. Frenkel*, 367 F.2d 197, 203 (2d Cir. 1966); *United States v. Rainbow Family*, 695 F.Supp. 314, 321-2 (E.D. Texas 1988); *Watts v. Kroczynski*, 636 F. Supp. 792, 795-6 (W.D. La. 1986).

In any context, the holding of a formal hearing is the irreducible procedural minimum process that may provide a basis for entry of issue resolving factual findings. *See Nat'l Independent Coal Operations' Ass'n v. Kleppe*, 423 U.S. 388 (1976) (no factual findings could be, or needed to be, entered in suit under Federal Coal Mine Health and Safety Act unless petitioner had exercised its right to request a hearing; protest against an administrative assessment was not equivalent to a request for a hearing).

"preponderance of the evidence"?[12] The Opinion seems to suggest that no such requirements even exist, and that the district court is free to do whatever it concludes is "fair, reasonable and consistent with the public interest", or, even worse, to imply that any "findings" that a district court makes on a motion to approve a CERCLA consent decree will be insulated from effective appellate review by a "double layer of swaddling" (App. 7a).[13]

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12. Although courts occasionally have discussed the validity of findings of fact by reference to whether they are supported by "substantial evidence" (*see, e.g., Nat'l Labor Relations Board v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 220 (1949); *Elam v. Comm'r of Social Security*, 2003 WL 1084489, * 1 (6th Cir.); *Kantor v. American & Foreign Power Co.*, 197 F.2d 307, 310 (1st Cir. 1952); *S.H. v. Heckler*, 1983 WL 44258 (S.D. Ind.)), the Federal Rules do not appear to permit, and it apparently was never Congress' intention to empower, district courts to resolve disputed factual issues merely based on "substantial evidence", without more. To do so would undercut many of the litigant's constitutional rights, including, *inter alia*, the right to due process of law and the right to a timely trial.

13. When reviewing findings of fact in the context of a consent decree, the normal standard for review is "clearly erroneous", not the "fair, reasonable, and consistent" standard for review of the consent decree itself. *See Molski v. Gleich*, 318 F.3d at, 953; *United States v. Davis*, 261 F.3d at 37; *United States v. Montrose*, 50 F.3d at 746; *United States v. Colorado & Eastern*, 50 F.3d 1530 at 1538. As noted in *Montrose Chem.*, "notwithstanding this 'swaddling,' there is a fundamental difference in the review of the sufficiency of evidence to support a settlement and the situation where there is no evidence at all on an important point." *United States v. Montrose Chem.*, 50 F.3d at 746 (*citing MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991)). As petitioners demonstrated in their brief and reply brief in the Court of Appeals, many of the district court's findings lack evidentiary support in the record.

The standard of review should depend on the procedure followed in the district court. *See Bose Corp. v. Consumers Union of United States,*

(Cont'd)

Even assuming that only "substantial evidence" (or at least **some** evidence) was required, this case raises questions as to what counts as "evidence" for purposes of such "findings", where no evidence has formally been taken (by way of trial or evidentiary hearing) at all. Are unverified exhibits submitted with motion papers, such as those on which the district court relied for some of its findings, such "evidence" as may support "findings"? Is deposition testimony? Are unsworn, unverified and unauthenticated "expert's" reports? As petitioners showed in the relevant sections of their brief and reply brief submitted

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(Cont'd)
Inc., 466 U.S. 485, 500 (1984). While the standard of review for Rule 52 findings of fact — when they are made and entered by the Court after trial or evidentiary hearing — is "clearly erroneous", the standard for review of Rule 56(d) "findings" on summary judgment is *de novo*. *See New York Life Ins. Co. v. Baum*, 707 F.2d 870 (5th Cir. 1983); *Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955, 960 (5th Cir. 1973). As petitioners demonstrated to the Court of Appeals (appellants' brief at 3-4; appellants' reply brief at 1-2), *de novo* review of the findings in this case — not deference to the district court — was appropriate, precisely because the district court never was in the position of a "finder of fact", charged with making credibility determinations and, accordingly, entitled to deference from appellate courts. *See Bose Corp.*, 466 U.S. 485 at 499 (deference to district court arises because of trial court's opportunity to judge credibility of witnesses).

When a district court makes findings of fact based entirely on documentary evidence, the reviewing court is in as good a position to evaluate the record as the district court. *Davis v. United States Steel Supply*, 1981 WL 26711, 6-8 (3d Cir.); *United States v. O'Brien*, 273 F.2d 495, 497 (3d Cir. 1959), *cert. denied sub nom Binion v. O'Brien*, 363 U.S. 812 (1960); *Forts v. Ward*, 566 F.2d 849, 842 n.8 (2d Cir. 1977).

Here, the Court of Appeals' decision gives no indication that that court ever examined either the findings, or the conclusions, under either a "clearly erroneous" or "*de novo*" standard.

to the Court of Appeals, the district court based many of its "findings" on that kind of so-called "evidence". Most frightening, though, are the numerous examples in this case of "findings" that are supported only by **arguments** made by respondents' counsel.[14] How could the Court of Appeals possibly have concluded that such "evidence" is sufficient to support "findings of fact"? Is it at all significant that in some cases the "findings" that are supported only by respondents' counsel's arguments, are also directly contradicted by arguments made by petitioners' counsel, or by transcripts of official court proceedings? Are **any** definite standards applicable to the entry by a district court of "findings of fact"?

Petitioners exhaustively addressed these issues in their brief and reply brief in the Court of Appeals (*see* appellants' brief at 31-53; reply brief at 1-18), and in their petition for rehearing. But, the Court of Appeals' consideration of these issues appears to have begun and ended with the (inaccurate) observation that "the basis for [appellants' objections] is the District Court's decision not to hold a full evidentiary hearing". (App. 14a, n.7). The question that petitioners raised was **not** "Should an evidentiary hearing have been held?", but, rather, "Which 'findings of fact', if any, could the district court appropriately

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14. Some of those very "non-facts" are repeated in the Opinion. For example, the alleged "peer review" of the Industrial Economics Report (App. 4a), the so-called "dissemination" (App. 4a) thereof (which in fact was merely a brief slideshow presentation, with no copies provided; *see* appellants' brief at 12-14; 16-17; 52-53; *see also* A2024; 2040-2041; 2162; 2166-8; 2180-81; 2200; 2202-3; 2229; 2231; 2235-6) and petitioners' alleged nonparticipation in settlement discussions (flatly contradicted in the record; *see* A-2204-5; A638-642; A109-110), all were "evidenced", if at all, only by oral argument of the motion seeking approval of the consent decree, advanced by respondents' counsel.

enter, within the rules and standards of due process, on **this** record?"

It is here, in respect of this critical analysis, that the Court of Appeals' Opinion creates the most dangerous precedent. For it would appear that now, in the Third Circuit, "[t]he Constitution does not require the court to conduct a full and formal evidentiary hearing to satisfy due process concerns" (App. 12a), even when the court proposes to make findings, and to draw legal conclusions therefrom, regarding disputed issues of fact! According to the Court of Appeals' Opinion here, if the issue is whether a district court consent decree approval was appropriate, the standard is whether that approval is "fair reasonable and in the public interest," even if the district court made findings of **disputed** facts without a trial or evidentiary hearing. That is bad law with dangerous implications.

Respondents have never contested that the February 14, 2001 oral argument was not an evidentiary hearing such as might have provided a proper procedural foundation for such all-encompassing factfinding. The Court of Appeals, like the district court, relied heavily on the observation that respondents had annexed exhibits to their motion to the court below, while petitioners did not submit exhibits with their opposition to that motion. (*See* App. 8a; 9a; 12a; 13a; 14a). That observation misses the point entirely. **Respondents** submitted no affidavits, no witnesses' testimony, and no authenticated documentary evidence to the district court.[15] They made arguments, not from a witness stand and not subject to cross-examination, frequently without any reference to any written material, and sometimes based on the report of a so-called expert which, in turn, was

15. The motion seeking approval of the consent decree was not even supported by a moving affidavit.

unverified, not qualified and consistently based on unsubstantiated hearsay.

Petitioners responded to these arguments in kind; they demonstrated in their memorandum and in open court, why respondents' arguments and claims were unsound. Petitioners' objections to the NRD settlement approval motion were narrow and focused. *See* A2015-2017. They were addressed for the most part to the sufficiency of respondents' own, unsworn, unsupported inadequate presentation. Petitioners annexed no exhibits to their opposition to the settlement approval motion because none were necessary. And neither petitioners, respondents nor the district court conducted or participated in an evidentiary hearing. The very fact that this is the way the consent decree approval motion was made and defended should have made it clear to the district court that making findings of disputed facts was inappropriate.

Petitioners did nothing to suggest to the district court that petitioner's opposition to the motion opened a door for that court to address all manner of material and immaterial, but disputed, factual issues, many of them peripheral or unrelated to the only question before the court on the motion to approve the settlement of the NRD Action. In sum, none of the parties had in any way chosen to submit material facts (in dispute for years), for determination by the district court. The district court should have confined itself to determining whether to approve the settlement or not, and limited its written opinion to an impartial (and non-punitive) explanation of its reasons for doing so. Or, the district court should have approved the consent decree, if it believed it was approvable as "fair reasonable and in the public interest", with no findings of disputed facts.

The prejudice to petitioners from such inappropriate and unsupported factual findings (fair, reasonable and in the public interest, or not) is palpable. At trial in the NRD Action, the district judge who will try this case has already found many of the material facts. Absent consideration by this Court, he may be inclined or even compelled to rule in accordance with his existing and outstanding opinion (whether respondents intend to rely overtly on his findings, or not). That result would be unfair, unjust and inappropriate.

So, too, the lack of notice to petitioners that the district court would be making "findings of fact" based on the February 14 oral argument, operated to deprive them of their right to due process, for no one requested "findings of fact" until the proceeding - oral argument of motions -was concluded. Surely, a litigant is entitled to known whether a proceeding is or is not one that may result in the entry of "findings of fact". Here, there was no suggestion that this was such a proceeding until **after** briefing and oral argument of the motion had been concluded.

The exchange that took place at the close of the February 14 oral argument between the district court and petitioners' counsel (quoted at pp. 9-10 above) shows graphically the district court's misunderstanding of petitioners' position, and of the issues implicated by making findings of fact in respect of disputed facts without a proper procedural basis. Petitioners never complained that the court had "foreclosed" them from presenting evidence; the problem was that nothing about the consent decree approval proceeding **required** them to do so. Petitioners never were given notice that the proceeding was one on which factual findings would be predicated; surely every oral argument by counsel is not an occasion (or an excuse) for the district court to decide all the disputed factual issues in the case.

The district court's obscure comment about "summary judgment" (p. 10 *supra*.) suggests an even more serious misunderstanding. Although petitioners' summary judgment motion had also been argued the same day and hundreds of documents (including deposition testimony) were submitted by both petitioner and respondent, the motion to approve the consent decree was not a summary judgment motion. If the court below was somehow under the mistaken impression that petitioners had failed to submit evidence in support of (or in opposition to) a **summary judgment motion**, that might explain the alacrity with which it entered findings of fact. But the settlement approval motion was not one for summary judgment, and there was no occasion for the district court to enter findings of (undisputed) fact such as are permitted under Fed. R. Civ. P. Rule 56(d).[16] On the contrary, it was a motion to approve a settlement, and the district court's only charge was to approve or disapprove that settlement, and to explain its reasons for doing so.

Consider the unfairness that would result if the procedure followed by the district court here were universally followed in motion practice. Every time one party made a motion, its opponents would be required to submit all the evidence in the case in opposition, because if they did not they would risk the district court ruling against them and adopting as "found facts"

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16. Even on summary judgment motions under Rule 56, the district court is never charged with resolving disputed factual issues. Rule 56(d) provides that on a summary judgment motion "the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating **counsel**, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." (Emphasis added.) The district court did not follow this procedure; it simply ignored any controversy as to the facts.

everything contained in the motion. That is a recipe for disaster, and not the way in which justice is administered, nor should it be.

Finally, as unwarranted and incorrect as the Court of Appeals' affirmance of the "findings of fact" was, its affirmance, without any semblance of review, of the district court's conclusions of law was equally unjustified and erroneous. It is well-settled that an appellate court should review a district court's "conclusions of law" under a *de novo* standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Henglein v. Colt Industries Operating Corp.*, 260 F.3d 201, 208 (3d Cir. 2001). Petitioners devoted a substantial part of their brief to an analysis of the errors in the district court's "conclusions of law". *See* appellants' brief at 31-54. But the Court of Appeals apparently united the "conclusions of law" with the factual findings and, applying an incorrect standard of deference to the district court, affirmed all the conclusions of law without comment.

Respectfully, this Court should grant the petition in order to consider the issues relating solely to the district court's "findings of fact", and the "conclusions of law" that rely thereon. Ultimately, this Court should vacate those findings, and conclusions, in their entirety, and precedentially confirm that the Federal Rules do not permit a district court to enter "findings of fact" except in accordance with Fed. R. Civ. P. 52 (after trial or evidentiary hearing) or Fed. R. Civ. P. 56(d) (on summary judgment motion). In that way, this Court will make it clear to the federal bench and bar that there are procedures for the entry of findings of fact which should be followed. If the Opinion of the Court of Appeals in the case at bar is allowed to have precedential effect, a tremendous injustice and an opportunity for litigation abuse by district courts will result.

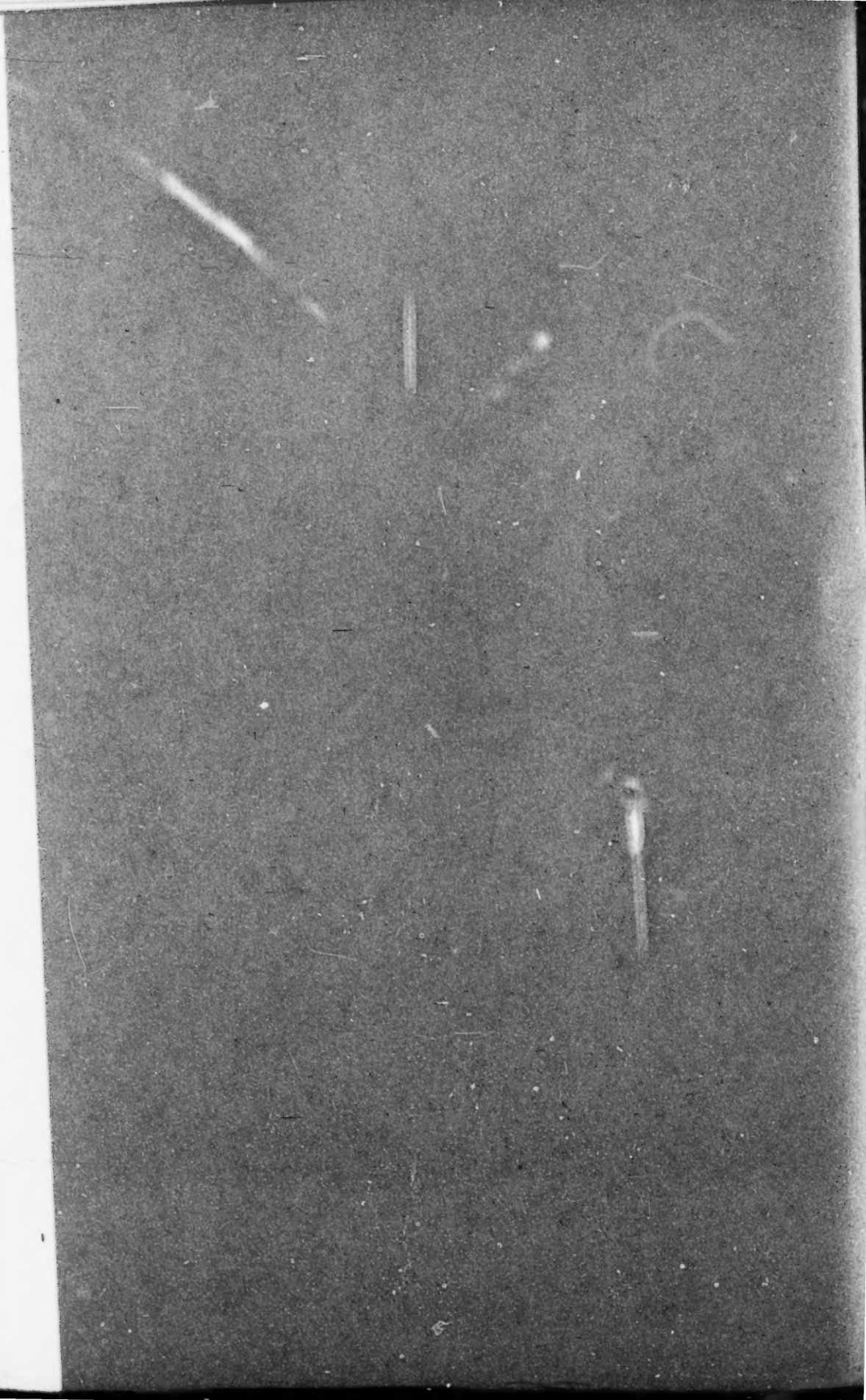
CONCLUSION

For the reasons set forth above, the petition should be granted in all respects, together with such other and further relief as this Court may deem just and proper.

Respectfully submitted,

ROBERT L. TOFEL
Counsel of Record
MARK A. LOPEMAN
TOFEL & PARTNERS, P.C.
Attorneys for Petitioners
780 Third Avenue
New York, New York 10017
(212) 752-0007

APPENDIX



APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED APRIL 8, 2003

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-4176 & 01-4204

In re: TUTU WATER WELLS CERCLA LITIGATION

COMMISSIONER OF THE DEPT. OF PLANNING & NATURAL RESOURCES, DEAN C. PLASKETT, in his capacity as Trustee for Natural Resources of the Territory of the United States Virgin Islands

v.

ESSO STANDARD OIL S.A., LTD.; ESSO VIRGIN ISLANDS, INC.; ESSO STANDARD OIL COMPANY (PUERTO RICO); TEXACO CARIBBEAN, INC.; TEXACO PUERTO RICO; THE SUCCESSOR PANEX INDUSTRIES STOCKHOLDERS' LIQUIDATING TRUST; MICHAEL D. DEBAECKE, ESQ., IN HIS CAPACITY AS TRUSTEE OF THE SUCCESSOR PANEX INDUSTRIES, INC. STOCKHOLDERS LIQUIDATING TRUST; PANEX CO.; THE ESTATE OF PAUL LAZARE BY ITS EXECUTORS, NORMAN HALPER and OLIVER LAZARE; ANDREAS GAL L'HENRI, INC. D/B/A O'HENRY CLEANERS

On Appeal from the District Court of the Virgin Islands
Division of St. Croix
D.C. Civil Action Nos. 98-cv-00206 & 96-cv-00054
(Honorable Raymond L. Finch)

Appendix A

Argued: September 20, 2002
Before: SCIRICA, ALITO and McKEE, *Circuit Judges*

(Filed April 8, 2003)

OPINION OF THE COURT

SCIRICA, *Circuit Judge*:

This is an appeal of the approval of a consent decree under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §§ 9601 et seq., substantially resolving more than a decade of litigation involving contamination of the Tutu Water Wells aquifer in the United States Virgin Islands. Three non-settling parties[1] appeal the District Court's approval of the consent decree, contending that the consent decree is arbitrary and unreasonable in its damage assessments and that the District Court erred in not conducting a full evidentiary hearing prior to its decision.

I.

This matter has been in litigation for several years. We have reviewed different aspects of this case on three separate occasions. In 1995, we dismissed claims against since-dissolved corporations. *In re Tutu Wells Contamination*

1. The non-settling parties are Andreas Gal, the Estate of Paul Lazare, and the Successor Panex Industries, Inc. Stockholders' Liquidating Trust. We will refer to these parties as the "Laga Parties," which is what the entities called themselves, taking the first two letters of their last names.

Litig., 74 F.3d 1228 (3d Cir. 1995) (table). In 1997, we reversed sanctions imposed upon defendant Esso by the District Court. *In re Tutu Wells Contamination Litig.*, 120 F.3d 368 (3d Cir. 1997). Finally, in 2000, we denied without discussion a petition for a writ of mandamus.

Before us now is the District Court's approval of a consent decree resolving the underlying litigation. The consent decree resolves two lawsuits arising out of the Tutu site contamination.[2] The first suit was filed by the Commissioner of the Department of Planning and Natural Resources, Dean C. Plaskett, in his capacity as Trustee for the Natural Resources of the Territory of the United States Virgin Islands, against Esso, Texaco, Gal, Lazare, and certain other parties under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §§ 9601 et seq., and territorial statutory and common law. In the second lawsuit, Esso and Texaco sought to recover contribution under CERCLA for remediation costs incurred under prior Environmental Protection Agency administrative orders.

In support of their joint motion to the District Court, the Settling Parties filed a two-volume appendix, including the consent decree and various EPA and other expert reports. The Trustee retained Industrial Economics to conduct a damage assessment, one of two nationally known firms that performs these assessments. *Comm'r of the DPNR v. Esso*

2. For a more detailed description of the contamination at the Tutu Wells site, see *In re Tutu Wells*, 120 F.3d at 373-78 (discussing factual and procedural history).

Standard Oil, Civ. No.1998-206, at 20 (D.V.I. filed Oct. 15, 2001). The assessment here examined two types of losses: "use related loss" represented the cost to rehabilitate the contaminated portions of the Tutu aquifer; and "non-use related loss" assessed the lost value to the public from non-use of the aquifer. Industrial Economics calculated the use related loss at $16.9 million and estimated the non-use related loss at approximately $19 million. Its work was peer-reviewed by Dr. Raymond J. Kopp, a senior fellow at Resources for the Future, and Dr. Kevin J. Boyle, a professor of environmental economics at the University of Maine.

In March 1999, all parties convened a settlement conference where the Trustee disseminated the Industrial Economics assessment to all defendants, including the Laga Parties. In conjunction with the EPA and the United States Department of Justice, the Trustee also prepared a spreadsheet to allocate fault percentages to the various parties. Based on relevant factors, including the volume and toxicity of the parties' contamination, their financial resources, and their degree of cooperation, the Trustee allocated a 38.89% share to Esso, a 26.98% share to Texaco, and a 19.84% share to the Laga Parties.[3]

The Laga Parties elected not to participate in settlement discussions beyond the initial March 1999 meeting. In contrast, Esso and Texaco participated in settlement negotiations with the Trustee between March and September 1999. These negotiations were conducted at arm's length and in good faith. They resulted in the parties agreeing in principle

3. The remaining share of 14.29% was attributed to lesser contributors.

to a consent decree, with Esso agreeing to pay $6.1 million and Texaco $3.195 million to settle the Trustee's claims.

On February 14, 2001, the District Court heard the Settling Parties' joint motion to enforce the consent decree and permitted all parties to submit evidence and make arguments. Both the Settling Parties and the Laga Parties presented the court with proposed findings of fact and conclusions of law. On October 15, 2001, the District Court approved the consent decree and the Laga Parties now appeal.

II.

This appeal presents two questions. First, was the District Court's approval of the consent decree fair, reasonable, and in the public interest? Second, did the District Court err by approving the consent decree without holding a full evidentiary hearing?

A.

In enacting CERCLA, Congress crafted a complex statutory scheme designed to ensure the cleanup of the nation's hazardous waste sites. In *FMC Corp. v. Department of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994), we noted "CERCLA's broad remedial purposes" and cited as "most important[ ]" CERCLA's "essential purpose of making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."

To this end, CERCLA provides the EPA with "a variety of tools for achieving the efficient and cost-effective cleanup of the nation's hazardous waste sites." *United States v. Occidental Chem. Corp.*, 200 F.3d 143, 147 (3d Cir. 1999). Notable for our purposes here is that the Act expressly provides that "[w]henever practicable and in the public interest . . . [the government] shall act to facilitate agreements . . . in order to expedite effective remedial actions and minimize litigation." 42 U.S.C. § 9622(a). Under CERCLA, the EPA and other environmental agencies like the DPNR are authorized to agree to settlements that "shall be entered in the appropriate district court as a consent decree." 42 U.S.C. § 9622(d)(1)(A).

We recently had occasion to consider judicial approvals of consent decrees in CERCLA actions. *United States v. SEPTA*, 235 F.3d 817, 822 (3d Cir. 2000). In *SEPTA*, the United States brought a CERCLA action against SEPTA, Conrail, and Amtrak, all prior owners of a contaminated rail yard. The parties resolved the dispute and sought entry of a consent decree. But another prior owner of the rail yard, American Premier, objected to the proposed settlement. The district court approved the consent decree and American Premier appealed.

On appeal, we considered the proper standard of review. As we stated:

> We approach our task mindful that, on appeal, a district court's approval of a consent decree in CERCLA litigation is encased in a double layer of swaddling. The first layer is the deference the

> district court owes to [the] EPA's expertise and to the law's policy of encouraging settlement; the second layer is the deference we owe to the district court's discretion. Thus, [a litigant] is faced with a heavy burden in its attempt to persuade us that the district court abused its discretion by approving the consent decree.

Id. (quoting, in part, *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)).

Appellate review, therefore, is "encased in a double layer of swaddling." *Id.* First, there is deference to the administrative agencies' input during consent decree negotiations and the law's policy of encouraging settlement. Where the appropriate agency has reviewed the record and has made a reasonable determination of fault and damages, that determination is owed some deference. *See Cannons*, 899 F.2d at 90 ("If the figures relied upon derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise."). Second, there is deference accorded the District Court under an abuse of discretion standard.

A court should approve a consent decree if it is fair, reasonable, and consistent with CERCLA's goals. *SEPTA*, 235 F.3d at 823. In evaluating the fairness of a consent decree, a court should assess both procedural and substantive considerations. Procedural fairness requires that settlement negotiations take place at arm's length. A court should "look to the negotiation process and attempt to gauge its candor, openness and bargaining balance." *Cannons*, 899 F.2d at 86.

Substantive fairness requires that the terms of the consent decree are based on "comparative fault" and apportion liability "according to rational estimates of the harm each party has caused." *SEPTA*, 235 F.3d at 823. "As long as the measure of comparative fault on which the settlement terms are based is not arbitrary, capricious, and devoid of a rational basis, the district court should uphold it." *Id.* at 824 (quotations omitted). A consent decree only need be "based on a rational determination of comparative fault, . . . whether or not [a district court] would have employed the same method of apportionment." *Id.*

Once a district court determines procedural and substantive fairness and approves the consent decree, we review its judgment for abuse of discretion. *Occidental Chem.*, 200 F.3d at 150 n.8. Parties challenging a district court's discretion bear a "heavy burden." We will not upset the court's judgment unless those parties demonstrate the court committed a material error of law or a "meaningful error in judgment." *Cannons*, 899 F.2d at 84; *see also United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1019 (8th Cir. 2002).

B.

Here, the Laga Parties offered no factual or documentary support for their arguments before the District Court. They elected not to offer any expert witnesses and submitted no expert reports to challenge those submitted by the Settling Parties. While they provide express references to deposition testimony to this court on appeal, they failed to do so before the District Court.

Instead of offering direct evidence to the District Court, the Laga Parties attempted to undercut the evidence submitted by the Settling Parties. They argued the record did not contain enough information for the District Court to determine whether the settlement's value was a rational determination of comparative fault. Specifically, they questioned the accuracy of the Industrial Economics damage assessment, arguing the estimation of non-use damages was inconclusive. They also contended the process did not provide them with sufficient opportunity to contest the assessment.[4]

The Laga Parties have not met their "heavy burden" to demonstrate a "meaningful error in judgment" by the District Court. The record includes evidence that Industrial Economics is one of only two companies in the United States that conduct these types of assessments. Its report was peer-reviewed and approved by two independent experts. The Settling Parties, negotiating at arm's length, accepted the report's findings. The Laga Parties received the Industrial Economics assessment at the same time as the Settling Parties and had ample opportunity to contest the fault share attributed to them. Instead, they elected to forgo the settlement process following the March 1999 meeting.

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4. The Laga Parties also contend the District Court should have disapproved the settlement because of a pending motion, offered by some of the Settling Parties and joined by the Laga Parties, alleging a conflict of interest by the trustee's counsel, John K. Dema. But the District Court's decision not to disapprove the settlement on these grounds was sound. The Settling Parties all consented to Dema's participation in the negotiations and the settlement was independently reviewed.

The Laga Parties were not obligated to participate in the settlement negotiations. But as we held in *Occidental Chemical*, and reaffirmed in *SEPTA*, "non-settling defendants may bear disproportionate liability for their acts." *Occidental Chem.*, 200 F.3d at 150 n.8; *see SEPTA*, 235 F.3d at 825. "In most instances, settlement requires compromise. Thus, it makes sense for the government, when negotiating, to give a [potentially responsible party] a discount on its maximum potential liability as an incentive to settle. Indeed, the statutory scheme contemplates that those who are slow to settle ought to bear the risk of paying more. . . ." *SEPTA*, 235 F.3d at 824-25 (quoting *United States v. DiBiase*, 45 F.3d 541, 546 (1st Cir. 1995)).

Esso, Texaco, and the other Settling Parties acknowledged to the District Court that they were prepared for trial but settled to avoid the risk of an adverse jury verdict. This type of compromise is contemplated by CERCLA. Thus, even if the Laga Parties' liability is increased as a result of this consent decree, it does not render the consent decree unfair.

As the Court of Appeals for the First Circuit has observed:

> Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and

> advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance. The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute.

Cannons, 899 F.2d at 84 (citations omitted).

Here, the District Court found the parties negotiated the settlement at arm's length. *Comm'r of the DPNR*, Civ. No.1998-206, at 39. The talks included Commissioner Plaskett of the DPNR and the Territorial Attorney General. The District Court found "the settlement comports with the public interest favoring settlement because it provides prompt resolution of the environmental claims and accountability." *Id.* at 44.

We see no abuse of discretion.

III.

A.

The District Court made 170 findings of fact and 91 conclusions of law. Citing *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C.Cir. 2001) ("It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings."), the Laga Parties challenge the District Court's failure to hold a full evidentiary hearing prior to adopting

the findings and conclusions, asserting they suffered "deprivations of the rights to due process to which [they] are entitled under the U.S. Constitution."

CERCLA favors fair and efficient settlements through consent decrees. 42 U.S.C. § 9622(d)(1)(A). The District Court here provided the Laga Parties an opportunity to submit evidence and present arguments to challenge the proposed CERCLA consent decree. The Constitution does not require the court to conduct a full and formal evidentiary hearing to satisfy due process concerns. *See BP Amoco Oil*, 277 F.3d at 1017-18 ("It is within the sound discretion of the trial court to decide whether an evidentiary hearing is necessary before ruling on a proposed consent decree. . . . Due process does not always require an evidentiary hearing, even where a significant interest is at stake.").

The decision whether to hold a full-blown evidentiary hearing is committed to the sound discretion of the District Court. Here, the settlement negotiations took place at arm's length, and produced a reasonable and fair result. The Settling Parties produced an extensive documentary record to support their joint motion. The record included exhibits, expert reports, and deposition testimony detailing the fruits of more than a decade of environmental investigation at the Tutu site. In contrast, the Laga Parties presented no competing documents, testimony, or analysis. They merely contested the Settling Parties' evidence as insufficient and replete with errors. We see no violation of the Laga Parties' due process rights.

Appendix A

B.

Citing *Hartford-Empire Co. v. Shawkee Manufacturing Co.*, 147 F.2d 532 (3d Cir. 1944), and *Sims v. Greene*, 161 F.3d 87, 89 (3d Cir. 1947), the Laga Parties contend the District Court erred by adopting nearly verbatim all of the factual findings and conclusions of law submitted by the Settling Parties during the February 14, 2001 hearing.[5]

Here, the Laga Parties failed to submit deposition testimony, expert reports, or analysis to support their criticism of the Settling Parties' evidence, and were afforded ample opportunity to be heard prior to and on February 14, 2001.[6] That the District Court adopted nearly verbatim the proffered findings and conclusions is irrelevant as long as those findings and conclusions were fair, reasonable, and consistent with the public interest. We have "squarely held that a district court's findings, when adopted verbatim from a party's proposed findings, do not demand more stringent scrutiny on appeal." *Lansford-Coaldale Water Auth. v. Tonolli Corp.*,

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5. The Laga Parties contend the District Court did not properly take into account the effect of the consent decree on other pending claims in the CERCLA and territorial law actions. But the District Court's obligation under CERCLA was to ensure the consent decree is fair, reasonable, and consistent with the statute's goals. Whether the court's findings have a preclusive effect against the Laga Parties only becomes ripe for determination if and when the Settling Parties use the findings and conclusions in other contexts.

6. The District Court's letter to counsel, dated February 1, 2001, indicated the February 14 proceeding was intended for the court to "entertain argument on the motion for summary judgment and the Consent Decree."

4 F.3d 1209, 1215 (3d Cir. 1993); *see also Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999).

The responsibility of district courts is clear — "[a] court should approve a proposed consent decree if it is fair, reasonable, and consistent with CERCLA's goals." *SEPTA*, 235 F.3d at 823. The District Court here approved a fair, reasonable, and consistent consent decree. We find no abuse of discretion.[7]

IV.

For the foregoing reasons, we will affirm the judgment of the District Court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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7. The Laga Parties also attack specifically a number of findings of fact as being unsupported or contradicted by record evidence, and a number of conclusions of law as being erroneous. The basis for many of these arguments is the District Court's decision not to hold a full evidentiary hearing, which we have addressed above. We find these attacks baseless, especially given the Laga Parties' failure to offer their own independent evidence to contradict the volumes of evidence submitted by the Settling Parties.

APPENDIX B — MEMORANDUM OPINION AND ORDER OFTHE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX DATED OCTOBER 15, 2001

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

CIVIL NO. 1998/206

COMMISSIONER OF THE DEPT. OF PLANNING & NATURAL RESOURCES, DEAN C. PLASKETT, in his capacity as Trustee For Natural Resources of the Territory of the Virgin Islands

Plaintiff,

v.

ESSO STANDARD OIL, S.A., LTD., et al.,

Defendants.

and

MASTER DOCKET NO. 1989-107-1227
CIVIL NO. 1996-0054(B)

IN RE: TUTU WATER WELLS CERCLA LITIGATION

MEMORANDUM OPINION

Finch, C.J.

This matter comes before the Court on the joint motion of Plaintiff, Commissioner of the Department of Planning and Natural Resources, Dean C. Plaskett, in his capacity as

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Trustee for Natural Resources of the Territory of the Virgin Islands ("Trustee"), and certain defendants, the Territory of the United States Virgin Islands (the "Virgin Islands"), including the Department of Education ("VIDOE"), Department of Planning and Natural Resources ("DPNR"), and the Virgin Islands Housing Authority ("VIHA"); and Esso Virgin Islands, Inc., Esso Standard Oil Co. (Puerto Rico), and Esso Standard Oil S.A. Ltd. (collectively "Esso"); and Texaco Caribbean, Inc., Texaco Puerto Rico, Inc. and Texaco, Inc. (collectively "Texaco"); and Vernon Morgan (collectively "the Parties") for approval of Agreement and Consent Decree ("Consent Decree") filed with the Court on October 18, 2000. A hearing on this matter was held on February 14, 2001.

The Court, having considered this matter and for the reasons set forth below, now enters this memorandum opinion as its findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 54(b).

I. Findings of Fact

1. In support of their Motion, the Parties filed a two-volume Appendix containing extensive documentation.

2. The purpose of the Consent Decree is to settle the Parties' differences in two lawsuits, Civil No. 1998/206 and Civil No. 1996/0054 (B).

3. On or about January 19, 2001, two non-settling parties, Andreas Gal ("Gal") and the Estate of Paul Lazare

("Lazare"), filed opposition to the Parties' motion. At or about the same time, another non-settling party, the Successor Panex Industries, Inc. Stockholders' Liquidating Trust ("the Trust"), filed opposition to the motion.

4. Gal, Lazare and the Trust object to the Consent Decree on two grounds: (i) they contend that the record "fail[s] to provide sufficient information upon which to evaluate whether the settlement terms are fair and reasonable"; and (ii) they contend that the involvement of John K. Dema, one of several attorneys representing the Trustee's interests in the NRD/Territorial Law Action, is not appropriate because of an alleged conflict of interest and on the grounds that the fee arrangement between Mr. Dema and the Government of the Virgin Islands is inappropriate. They reason from these premises that the Consent Decree should not be approved.

5. Gal, Lazare and the Trust did not file any affidavits, deposition testimony or exhibits with their opposition memoranda.

6. On or about February 6, 2001, Esso, Texaco, the Trustee, the Virgin Islands and VIHA filed reply memoranda of law responding to the opposition of Gal, Lazare and the Trust. Therein, the Parties referred the Court to the eight volumes of exhibits Esso and Texaco had previously filed with the Court in opposition to other motions filed in Civil No. 1996-0054(B).

7. On February 14, 2001, the Court held a hearing on the Motion to Approve and Enter the Consent Decree. At the hearing, the Trustee marked and presented to the Court five

additional exhibits. *See* Transcript of February 14, 2001 Hearing ("2/14/01 N.T."), p. 85. Gal, Lazare and the Trust did not present any exhibits or evidence at the hearing. *Id.* at pp. 72-73; 144-145.

8. The matter has now been fully briefed and heard and is ripe for decision.

A. *Introduction*

9. The two lawsuits which are the subject of the Consent Decree arise out of the same subject matter, *i.e.*, the contamination of the soil and groundwater in the Tutu area of St. Thomas ("Tutu").

10. The principal contaminants of the groundwater at Tutu are certain chlorinated volatile organic compounds ("CVOCs") commonly used in dry cleaning, textile manufacturing and degreasing operations. *See* July 1996 EPA Record of Decision ("ROD") at 8 (Exhibit D). *See also* Expert Report of James E. Etzel, Ph.D., P.E. ("Etzel Report") (Exhibit C). The specific CVOC contaminants of concern found at Tutu include: tetrachloroethene (or perchloroethylene) ("PCE"), trichloroethene ("TCE"), 1,2-dichloroethene ("WE"), and vinyl chloride. *Id.*

11. The other contaminants found at Tutu are petroleum-related compounds, namely benzene, toluene, ethyl benzene and xylene ("BTEX") and methyl tert butyl ether ("MTBE"). *See* ROD at 9.

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12. In addition, the Trustee alleges that waste oil and heavy metals contaminate the aquifer.

13. The area of the contamination at Tutu has been included by the U.S. Environmental Protection Agency (the "EPA") on the CERCLA National Priorities List of Superfund sites, designated as the Tutu Wellfield Site. *See id.* at 3; and Map of Tutu area (Exhibit B).

14. The two lawsuits are the last of a series of lawsuits arising out of the contamination at Tutu.

15. In Civil No. 1998/206 (the "NRD/Territorial Law Action"), the Trustee sued Esso, Texaco, Gal, Lazare and certain other parties under the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C §§ 9601 *et seq.*, and territorial statutory and common law to recover for alleged damage to the natural resources of the Virgin Islands, as well as other damages, resulting from the groundwater contamination at Tutu.

16. In Civil No. 1996-0054(B) (the "CERCLA Action"), Esso and Texaco seek to recover from other responsible parties, including the Government of the Virgin Islands, the costs Esso and Texaco incurred in responding to the contamination pursuant to EPA administrative orders.

17. By agreeing to and requesting approval and entry of the Consent Decree, the Government of the Virgin Islands, the Trustee, Esso and Texaco seek approval of their settlement of the Trustee's claim against Esso and Texaco asserted in

Civil No. 198/206. The Government of the Virgin Islands, Esso and Texaco also seek the Court's approval of their settlement of Esso's and Texaco's CERCLA claims against the Government of the Virgin Islands asserted in Civil No. 1996-0054(B).

18. Based on my review of the Consent Decree, the exhibits, the memoranda and the statements of counsel, and based on the factual findings and conclusions of law set forth herein, I find that the Consent Decree has been negotiated in good faith and at arm's length over many months, with active oversight and participation by the Court, and that the terms of the Consent Decree are fair, reasonable, and in the public interest.

B. ***The Contamination at Tutu***

19. The contamination at Tutu was first discovered on July 8,1987, when Eric Tillett, a commercial water purveyor, detected a gasoline odor emanating from a well he operated at Tutu. *See In Re Tutu Wells Contamination Litigation,* 994 F. Supp. 638, 641(D.V.I. 1998).

20. Mr. Tillett closed his well and contacted the Virgin Islands DPNR, which notified the EPA. EPA's Tactical Assistance Team conducted an immediate investigation. *Id. See also* ROD at 1; and April 1995 Phase II Remedial Investigation ("RI") (Exhibit E), at 1-5.

21. Sampling of wells at Tutu "revealed the presence of 1, 2-Trans-Dichloroethylene ('DCE'), Trichloroethylene ('TCE'), Tetrachloroethylene ('PCE'), Toluene ('TOL'),

benzene, and Terbutylmethylether ('TBME')." *Tutu,* 994 F. Supp. at 642. *See also* ROD at 2; and RI at 1-5.

22. Between July 31, 1987 and September 2, 1987, the DPNR issued orders closing thirteen commercial and five private water wells at Tutu. *Tutu,* 994 F. Supp. at 642. *See also* RI at 1-5.

23. A few of these wells are currently in use for non-potable purposes. *See* ROD at 1; and RI at 1-5.

24. Over the ensuing thirteen years, the contamination of the groundwater has engendered extensive EPA and DPNR investigatory proceedings and caused extended private party litigation. *Tutu* 994 F. Supp. at 641-42, 644-51.

C. *The EPA/DPNR Instigation*

25. EPA began its investigation of the contamination at Tutu almost immediately after Mr. Tillett's notice in 1987. *See Tutu,* 994 F. Supp. at 641. *See also* ROD at 1-2; and RI at 1-5 to 1-6.

26. It did so under the provisions of CERCLA, 42 U.S.C. §§ 9601 *et seq.*, and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*

27. Between 1987 and March 1989, the EPA conducted its preliminary assessment of the facilities and potentially responsible parties for the contamination at Tutu. *See Tutu,* 994 F. Supp. at 642.

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28. The facilities studied included the former textile plant owned and operated by Laga (the "Laga plant" or "Laga facility"), the O'Henry dry cleaning establishment, Texaco and Esso, each of which owned a retail gasoline service station, and an automobile repair shop called Ramsay Motors, Inc. *Id.*

29. On March 22,1990, pursuant to CERCLA and RCRA, the EPA issued a Unilateral Administrative Order ("1990 UAO") (Exhibit F) to Texaco, Esso and L'Henri, Inc., the owner of the O'Henry facility (also referred to as the "L'Henri facility"). *Id. See also* RI at 1-6; and ROD at 2.

30. The 1990 UAO required those parties: (1) to prepare a Sampling, Analysis and Monitoring Plan ("SAMP") for supply wells; (2) to implement a groundwater quality monitoring program for the supply wells; (3) to provide potable water, as needed, to all affected residences until the homes were connected to a water supply line; and (4) to provide a permanent water supply to affected residences. *See* 1990 UAO at 11-17.

31. In March 1990, in response to EPA's requests, Esso and Texaco formed the Tutu Environmental Investigation Committee ("TEIC") to conduct their joint investigatory and remedial activities at Tutu. *See* ROD at 3; and RI at 1-1.

32. TEIC, in turn, hired the environmental consulting firm, Geraghty & Miller, and other contractors to do the investigatory work. *See* ROD at 3; and RI at 1-1.

33. In September 1990, EPA approved the SAMP prepared by Geraghty & Miller and between October 1990 and March 1993, TEIC conducted eight rounds of supply well sampling. Quarterly reports summarizing the results were submitted to EPA. *See* August 1999 Expert Report of Robert H. Harris on Allocation of Response Costs at the Tutu Wellfield Site ("ENVIRON Report") (Exhibit G), at II-2.

34. Esso and Texaco also agreed with EPA to a program of delivering potable water by truck as a permanent water supply for affected residences. *Id.* at II-3.

35. From May 1990 to the present, Esso, Texaco and, to some extent, L'Henri have provided potable water to affected residences. *Id.*

36. The costs to Esso and Texaco for the preparation and implementation of the SAMP and provision of water to affected residences through August 1999 had exceeded $837,000. *Id.*

37. On June 30, 1989, the EPA issued a draft Administrative Order on Consent ("AOC") to Texaco, Esso and L'Henri requiring those parties to conduct and pay for a Remedial Investigation ("RI") at the Tutu Wellfield Site. Texaco and Esso agreed to do so, but L'Henri declined to participate. *Id.* at II-4.

38. In August 1991, the EPA presented its Hazard Ranking System document for the Tutu Wellfield Site, in which EPA identified the following nine facilities as known or potential sources of groundwater contamination: the Virgin

Islands Housing Authority ("VIHA") building, the Department of Education Curriculum Center (the former Laga facility), Ramsay Motors, Antilles Auto Parts, Texaco Tutu, Tillett Gardens, Esso Tutu, O'Henry Dry Cleaners, and Rodriguez Auto Parts. *See* RI at 1-7.

39. Pursuant to the terms of the AOC distributed in draft by EPA in June 1989 and issued in February 1992, Esso and Texaco, through TEIC, funded and, under EPA supervision, performed the Remedial Investigation ("RI"), which studied the extent of contamination and identified the sources of contamination, and prepared the Feasibility Study ("FS"), which evaluated the various remedial alternatives at Tutu. The RI was conducted between June 1989 and April 1995, when the final RI Report was accepted by EPA and issued. *Id.* at 1-6 to 1-7. *See also* ENVIRON Report at II-6.

40. The purpose of the RI was to determine the nature and extent of the hazardous contamination and any threat to the public health, welfare and/or environment caused by the release or threatened release of pollutants at Tutu. *See* AOC dated February 19,1992 at III.6 (Exhibit H). The purpose of the FS was to develop an appropriate range of treatment options that would ensure the protection of human health and the environment. *Id.*

41. Esso and Texaco incurred costs in excess of $2,686,120 in their performance of the RI/FS investigation and reporting through August 1995. *See* ENVIRON Report at II-8.

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42. The extensive RI/FS concluded that both the soil and the groundwater at Tutu had been impacted by two categories of contaminants: (i) CVOCs (PCE, TCE, DCE and vinyl chloride); and (ii) petroleum-related compounds (BTEX and MTBE). *See* RI, Section 5; and FS at 2-14 to 2-25.

43. The RI Report found at 5-31, 5-32 that the following properties at Tutu had soil impacted by CVOCs: Curriculum Center (former Laga plant); Esso Tutu Service Station; and O'Henry Dry Cleaners.

44. The following properties were found to have soil that had been impacted by petroleum-related components: Curriculum Center (former Laga plant); Ramsay Motors; Antilles Auto Parts; Texaco Tutu Service Station; Western Auto; and Esso Tutu Service Station. *See* RI at 5-30, 5-31.

45. With respect to contamination of the groundwater at the Tutu Wellfield Site, the RI Report concluded that there were distinct plumes of groundwater impacted by CVOCs and petroleum-related compounds. *Id.* at 5-34 to 5-36 and 5-39 to 5-45.

46. The RI Report concluded that the following properties were sources of CVOC (PCE, TCE, DCE and vinyl chloride) impact to groundwater: Curriculum Center (former Laga plant); and O'Henry Dry Cleaners. *Id.* at 5-58.

47. Due to the presence of CVOCs in the soil at the Esso Tutu Service Station, the RI Report stated that the property could not be ruled out as a potential source of impact

to groundwater. "However, no increase in [CVOC] concentrations was detected in groundwater up or down-gradient of the Esso Tutu Service Station. . . ." *Id.*

48. The RI Report concluded that the following properties were sources of petroleum-related impact to groundwater: Texaco Tutu Service Station; Esso Tutu Service Station; and Kentucky Fried Chicken (former Home Petroleum Service Station). *Id.* at 5-57.

49. Finally, the RI Report concluded that it was probable that dense nonaqueous phase liquid ("DNAPL") of PCE existed in the fractured bedrock, also noting that the presence of the DNAPL would be the "overriding factor" determining the ability, and the time needed, to clean up the aquifer. *Id.* at 8-3 to 8-5.

50. The RI Report and FS Report were released to the public for comment on August 23, 1995. The availability of these documents was published in the *Virgin Islands Daily News* and the *Virgin Islands Weekly Journal* in February 1996. The public comment period on these documents was held from February 12,1996 to March 13, 1996. *See* ROD at 3.

51. On March 5, 1996, EPA held a public meeting at the Curriculum Center to inform local officials and interested citizens about the CERCLA process, to review current and planned remedial activities at the Tutu Wellfield Site, and to respond to any questions from area residents and other attendees. *Id.*

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52. EPA responded to comments at the meeting and in writing during the public comment period in its ROD. *See id.; see also* ROD at Appendix V.

53. Pursuant to CERCLA and after receipt of the RI Report and the FS Report, EPA selected a remedial action for the Tutu Wellfield Site. *See* ROD at i-vi. EPA set forth the selected remedial action in its Record of Decision issued in August 1996. *Id.*

54. In the ROD, which is based on the RI Report and the FS Report, EPA identified three properties as having CVOC impact to soil: Curriculum Center (former Laga property); Esso Tutu Service Station; and O'Henry Dry Cleaners. *Id.* at 6.

55. Specifically, with respect to the Curriculum Center (former Laga plant), the EPA stated that concentrations of CVOCs may be present in the soil beneath the building or in the unsaturated bedrock. "The elevated concentrations of [CVOCs] in groundwater adjacent to and immediately downgradient of the Curriculum Center indicate a high probability that pure product [PCE] is present in the unsaturated zone as dense non-aqueous phase liquid (DNAPL) at the Curriculum Center." *Id.*

56. EPA reported that petroleum-related compounds had been found at five properties: Curriculum Center (former Laga plant), Ramsay Motors, Texaco Tutu, Western Auto, and Esso Tutu. *Id.* at 7.

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57. With respect to the groundwater contamination, the EPA reported that the comprehensive groundwater sampling indicated the presence of four plumes of groundwater contamination (i.e., two CVOC plumes and two petroleum-related compound plumes). *Id.* at 8-9.

58. The two CVOC plumes were extensive and covered the entire Tutu Wellfield Site. *Id.*

59. The northern CVOC plume was found to originate at the former Laga plant and to extend south for approximately 1600 feet. *Id.* at 8. The EPA stated that the stability and nature of the concentration of CVOCs in this plume indicated that there was a continuing source of CVOCs to the groundwater at the former Laga plant. *Id.* This source would be in the form of DNAPL (pure PCE) in the bedrock that was slowly but continually leaching into the groundwater. *Id.*

60. The southern CVOC plume was found to originate near the O'Henry Dry Cleaners and to extend approximately 4000 feet and to be approximately 800 feet wide. *Id.* at 9.

61. The two petroleum-related compound plumes were found to be relatively localized. One was located near Texaco Tutu and one near Esso Tutu. *Id.*

62. The petroleum-related plume near Texaco Tutu was found to be approximately 400 feet by 200 feet in areal extent. *Id.*

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63. The petroleum related plume near Esso Tutu was found to be approximately 250 feet by 175 feet. *Id.*

64. The remedial alternative selected by the EPA for the soil contamination consisted of specific activities at five affected properties:

Texaco Tutu Service Station

In-situ soil vapor extraction treatment of impacted soil and catalytic oxidation for off-gas treatment.

Esso Tutu Service Station

In-situ soil vapor extraction and bioventing of impacted soil and thermal oxidation for off-gas treatment.

Four Winds Plaza/Western Auto

Excavation and off-site disposal of additional soils, if confirmed in subsequent sampling.

O'Henry Dry Cleaners

In-situ soil vapor extraction of impacted soil (if this proves ineffective, excavation and ex-situ treatment and redepositing), in situ soil vapor extraction in the unsaturated rock, and thermal oxidation for off-gas treatment.

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Curriculum Center (former Laga plant)

> Excavation of impacted soils, followed by either off-site disposal or ex-situ soil vapor extraction and redepositing; in-situ soil vapor extraction in unsaturated bedrock areas and soil areas; and thermal oxidation for off-gas treatment.

Id. at 38-39.

65. The EPA selected a "pump and treat" system for the petroleum-related groundwater contamination. The system consists of installing extraction wells and air strippers at Texaco Tutu and Esso Tutu to extract the petroleum-related compounds and treat the water. *Id.* at 40.

66. The remediation of the CVOC plumes is significantly more complicated.

67. The EPA has concluded that the first step is to control and confine hydraulically the contamination sources. *Id.* at iv and 40. This source containment will be accomplished by installing groundwater recovery wells that will provide hydraulic barriers around the source areas and allow the reduction of contaminants in other parts of the aquifer. *Id.*

68. In addition, the ROD called for a central groundwater treatment facility. *Id.*

69. On May 28, 1998, the EPA issued Unilateral Administrative Orders (UAOs) to Texaco, Esso, L'Henri and Four Winds/Western Auto regarding the implementation of

the remedial measures at each of their sites. *See* EPA Press Release, August 28,1998 (Exhibit J). *See also* ENVIRON Report at IV-4 to IV-5; July 1999 Expert Report of Forensic Environmental Services, Inc. ("Forensic Report"), Exhibit FF to Third-Party Plaintiffs' Opposition to Summary Judgment Motion of Gal and Lazare ("Opposition"), at vii and 9-1; Expert Report of Robert E. Hinchee and Todd H. Wiedemeier ("Hinchee/Wiedemeier Report"), Exhibit GG to Opposition, at 3-4; July 1999 Expert Report of Robert H. Harris ("ENVIRON Liability Report"), Exhibit II to Opposition, at 10; and JR Kolmer Assessment of Groundwater Remedial Systems ("Kolmer Report"), Exhibit KK to Opposition, at 7 and I1-13.

70. Texaco and Esso each notified the EPA in 1998 that they would comply with the UAO issued to it, and Texaco and Esso have now completed the design and construction of the cleanup systems at each of their sites. *Id.* These systems are currently operating as intended to remediate the localized petroleum-related plumes. *Id.* Esso and Texaco have asserted that these remedial systems will eventually eliminate the petroleum contamination in the Tutu Aquifer. *Id.*

71. The full-scale cleanup of the CVOC plumes has not yet begun. *See* Forensic Report at viii and 9-1.

72. Gal, Lazare, the Trust and other former owners of the Laga plant ("the Laga Parties") have neither commenced any remedial action nor agreed to undertake or finance any remedial action with respect to the contamination EPA has concluded has emanated and is emanating from that facility. *See* ENVIRON Report at IV-5.

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73. EPA has taken deep boring samples beneath the former Laga plant and found significant concentrations and quantities of CVOCs (PCE, TCE, DCE and vinyl chloride) directly beneath the plant. *See* March 19,1999 EPA materials, Exhibit EE to Opposition; and Forensic Report, Section 4.4 (discussing the spatial distribution of DNAPL below the water table in the fractured bedrock beneath the north-central portion of the former Laga property) and Figures 4-2 to 4-5 (graphically depicting the DNAPL below the former Laga plant).

74. The detection of these large quantities of CVOCs and DNAPL by the EPA immediately below the former Laga plant strongly suggest that the operation of the former Laga plant was the major source of CVOC contamination in the Tutu Aquifer. *Id. See also* Hinchee/Wiedemeier Report at 2-6, 3-1 and 3-2; Etzel Report at 2-4 and 7; ENVIRON Liability Report at 5-7; and Kolmer Report at 9-11.

75. Texaco and Esso jointly paid for the RI/FS and reimbursed the EPA for the costs EPA incurred in conducting the oversight of the RI/FS. *See* ENVIRON Report at II-1 to II-9 and IV-1 to IV-3.

76. In doing so, Texaco and Esso paid more than $7.5 million through August 1999 toward remediation of the Tutu Wellfield Site. *Id.*

77. The EPA estimated that Texaco will spend up to $1 million in its remediation and that Esso will spend approximately $700,000 on its cleanup. *See* EPA Press Release, May 28,1998, Exhibit J.

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D. *Private Party Litigation*

(1) *Property damage actions*

78. While all of the foregoing regulatory investigatory activities were proceeding, the parties were also involved in intense, complex, private party litigation.

79. The first lawsuit was filed on April 20, 1989 by Total Vision, Inc. d/b/a Tillets Water Delivery, Inc. and the Tillet family against Texaco and Esso. *In Re Tutu Wells Contamination Litigation,* 846 F. Supp. 1243, 1250 n.1 (D.V.I. 1993).

80. This initial lawsuit was followed, on July 6, 1989, by an action filed by PID, Inc. and the Harthman family and, on July 7, 1989, by a third lawsuit filed by Four Winds Plaza Partnership.

81. The Court consolidated the cases on November 8, 1989.

82. The three sets of plaintiffs asserted similar claims: (i) they owned real property situated above the Tutu Aquifer; (ii) that they had commercial and private wells on their properties which drew water from the Aquifer; and (iii) that the contamination caused them to suffer diminution in value of their property and lost profits because they could no longer use or sell the water they pumped from the Aquifer.

83. The cases quickly grew into "complex multi-layered litigation with Third and Fourth Amended Complaints,

counterclaims, cross-claims, third party claims, and fourth party claims. Over two dozen parties, and an equally large number of counsel, [became] involved." *Id.* at 1252.

84. The defendants included, *inter alia,* the owners and operators of the former Laga plant, O'Henry Dry Cleaners, Esso, Texaco, the VIDOE, and the VIHA.

85. The lawsuit filed by the Tillett family settled on January 11, 1991; the other two lawsuits, however, were intensely discovered and litigated for many additional years.

86. Thousands, if not millions, of documents were produced and well over one hundred depositions of fact witnesses were taken. *Tutu,* 846 F. Supp. at 1252.

87. In addition, most of the parties retained hydrogeologic and other environmental experts to conduct their own investigations regarding the nature, extent and sources of the contamination at Tutu. The results of these investigations were shared by the parties and with the EPA.[1]

88. The parties exchanged more than 40 expert reports and took depositions of more than 40 experts.

89. The lawsuit instituted by Four Winds Plaza Shopping Center was ultimately settled in the spring of 1994, and the lawsuit instituted by PID, Inc. and the Harthman family was settled in the winter of 1996 after jury selection.

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1. The work of many of these investigators is chronicled in the RI Report at 1-11 through 1-14 and 2-1 through 2-11.

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(2) *The CERCLA Action*

90. During the pendency of the property damage actions, the parties and the Court agreed to sever and stay the claims for response costs under CERCLA that the parties had against each other. *Tutu,* 994 F. Supp. at 644.

91. By Order dated February 19, 1998, this Court lifted the stay on the parties' CERCLA claims and ordered that those claims be prosecuted in Civil No.1996-0054(B), the CERCLA Action.

92. Thereafter, the parties engaged in factual discovery and again retained experts to assess the merit of the claims *inter se.* By Order of this Court dated November 30, 1998, fact discovery in the CERCLA Action closed on March 31, 1999; by Order dated May 28, 1999, expert discovery closed on September 30, 1999.

93. In discovery, the parties exchanged more than ten additional expert reports, and took more than ten additional expert depositions.

94. In the CERCLA Action, the largest claims are those of Texaco and Esso for recovery from the other responsible parties of their fair share of the costs of conducting the RI/FS and paying for the EPA oversight.

95. To support their claims, Texaco and Esso engaged ENVIRON, an environmental consulting firm, to (1) summarize the nature and amount of the claim for response costs, and (2) allocate those response costs to the parties against whom cost recovery claims were made.

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96. In preparing its report, ENVIRON performed a comprehensive review of the available documentary support — including every available invoice underlying the Texaco and Esso parties' joint response cost claim — and synthesized it into a comprehensive report and summary table. *See* ENVIRON Report.

97. The ENVIRON Report (as well as the underlying documentation) was subject to discovery in the case and Gal, Lazare and the Trust received a copy of it.

98. Gal, Lazare and the Trust have had ample opportunity to take discovery and to determine the amount, nature and factual support underlying Esso's and Texaco's cost recovery claim against those parties and the Government of the Virgin Islands with respect to the former Laga facility.

99. Almost every party to the CERCLA Action except Gal, Lazare and the Trust proffered some degree of an expert case.

100. ENVIRON allocated 49.7% of the total response cost burden to the "Laga/Curriculum Center" site. ENVIRON Report at III-25.

101. Gal, Lazare and the Trust chose not to present any expert reports or affidavits to challenge the conclusion of the ENVIRON Report or the other expert reports supporting Esso's and Texaco's Opposition to the summary judgment motions of Gal, Lazare and the Trust.

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102. ENVIRON allocated among five sites that contributed to the contamination at Tutu a percentage share of the response costs incurred by Esso and Texaco. The five sites are Esso Tutu, Texaco Tutu, the former Laga property, O'Henry Dry Cleaner and' Four Winds/Western Auto. The percentage share attributed by ENVIRON to each site is:

Laga/Curriculum Center	–	49.7%
O'Henry (L'Henri)	–	19.3%
Esso	–	13.0%
Texaco	–	-12.2%
Four Winds/W. Auto	–	-5.8%

Id.

103. Using these percentages and including EPA's oversight and other costs, Esso and Texaco's joint claim against Laga/Curriculum Center exceeds $4 million, against L'Henri exceeded $1.5 million, and against Four Winds/ Western Auto exceeded $450,000. *Id.* at II-8 to II-9 and III-25.

104. Utilizing ENVIRON's allocation, Esso and Texaco have negotiated settlements with the L'Henri parties, Four Winds and Western Auto. Those parties have finalized their settlements and have filed Stipulations of Dismissal of their CERCLA claims *inter se.*

105. Esso and Texaco have agreed to a settlement of their claims against the Virgin Islands Department of Education ("VIDOE") and the VIHA as set forth in the Consent Decree.

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E. The NRD/Territorial Law Claims

106. After settlement of the above-described private party litigation and during the pendency of the CERCLA Action, the Trustee filed the Complaint in the NRD/Territorial Law Action.

107. In his Complaint, the Trustee seeks to recover from Gal, Lazare, the Trust, L'Henri, Esso and Texaco for damage to the natural resources of the Territory of the Virgin Islands under federal and territorial statutory law and the common law.

108. Shortly after the Trustee filed the Complaint, Esso and Texaco filed a joint Motion to Disqualify one of the attorneys representing the Trustee, John K. Dema.

109. The Trustee opposed the Motion.

110. With the agreement of the parties, the Court stayed all proceedings in this case pending resolution of the Motion.

111. The Court also encouraged the parties to discuss amicable resolution of the case.

112. Without waiver or prejudice to any parties' rights, and with full knowledge and consent, the Trustee, the Virgin Islands, Esso and Texaco agreed to discuss settlement.

113. As set forth below, these discussions were extensive and were eventually successful. *See e.g.*, 2/14/01 N.T. at pp. 74 and 77.

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114. The Trustee retained experts to assess the value of the damaged resources. In particular, the Trustee hired Industrial Economics, Inc., one of the two foremost nationally known firms in the United States in performing such assessments. *See id.* at p. 88; and Plaintiff's Exhibit 3.

115. Industrial Economics evaluated the extent of damage and prepared a preliminary assessment which the Trustee used to start settlement discussions with the defendants. *See* 2/14/01 N.T. at p. 89; and Plaintiff's Exhibits 2 and 3.

116. The assessment described two types of alleged losses: (i) use related loss; and (ii) non-use related loss. *See* Plaintiff's Exhibit 3.

117. Industrial Economics calculated the first damage component, "use related loss," to be $16.9 million. *See* Plaintiff's Exhibit 3 at 14-31. *See also* 2/14/01 N.T. at pp. 89 and 136. The "use related loss" addressed the cost to rehabilitate and/or acquire the equivalent of the contaminated portions of the Tutu aquifer. *See* Plaintiff's Exhibit 3 at 14-31. It was based upon a study of the increased costs to the public of trucking water to Tutu in perpetuity. *Id.* The $16.9 million figure is the present value of those costs and includes water demand adjustments and an analysis of surplus losses. *Id.*

118. With respect to the second damage component, "non-use related losses," Industrial Economics estimated them to be approximately $19 million. *Id.* at 32-33. *See also* 2/14/01 N.T. at p.136. The non-use related losses concerned the public's loss of the existence of and option to use the

aquifer. *See* Plaintiff's Exhibit 3 at 32-33. At that time, however, Industrial Economics did conclude that additional study would be necessary to assess accurately the non-use related losses. *Id.*

119. The work of Industrial Economics was peer-reviewed by Raymond J. Kopp, Ph.D., Senior Fellow, Resources for the Future, Washington, D.C. and by Kevin J. Boyle, Ph.D., Libra Professor of Environmental Economics, Department of Resource Economics, University of Maine.

120. The foregoing assessment of losses formed the basis for the Trustee's settlement demands. *See* Plaintiff's Exhibit 2; and 2/14/01 N.T. at p. 136.

121. Relying upon the extensive factual record available as set forth above, the Trustee then performed an analysis of factors deemed relevant to allocate percentages to the parties in the NRD/Territorial Law Action. *Id.* at pp. 74-75.

122. In conjunction with EPA and DOJ, the Trustee evaluated legal precedents and prepared an allocation spreadsheet using various factors traditionally deemed relevant — toxicity and carcinogenicity, volume, financial resources, knowledge or acquiescence, and degree of non-cooperation. *See id.* at pp. 69-70, 75, 89 and 134-136; and Plaintiff's Exhibits 1 and 2.

123. The Trustee's allocation attributed a 26.98% share to Texaco and a 38.89% share to Esso. *See* Plaintiff's Exhibit 2. Using the $16.9 million "use related loss" value asserted by the Trustee, the Trustee calculated a $6.57 million share for Esso and a $4.56 million share for Texaco. *Id.*

124. The Trustee made adjustments or discounts to the calculated shares in recognition of litigation risk, the time value of money, the priority to address restoration issues, and the avoidance of litigation costs. *See* 2/14/01 N.T. at p. 137.

125. The Trustee first presented his settlement analysis to all defendants at a meeting at the Department of Justice in Washington, D.C. in March 1999. *See* Plaintiff's Exhibits 1, 2 and 3. Most, if not all, of the parties to the CERCLA and NRD/Territorial Law cases were invited to and attended that meeting, including specifically representatives of Gal, Lazare and the Trust.

126. At that meeting, the Trustee made initial demands to the defendants, including Gal, Lazare and the Trust. *See* 2/14/01 N.T. at pp. 88-89 and 134-135. Counsel for Gal and Lazare admitted at the February 14, 2001 hearing that he saw the presentation embodied in Plaintiff's Exhibit 3 at the March 1999 meeting and also conceded receiving a demand to settle based on a 19.84% allocated share. *See id.* at pp. 72, 76, 105, 107 and 109.

127. After the Trustee's settlement presentation at the March 1999 meeting, Gal, Lazare and the Trust elected not to participate in any settlement discussions with the Trustee and communicated that decision to the Trustee's counsel. *See id.* at pp. 92, 95 and 135.

128. Between March and September 1999, the Trustee, the Virgin Islands and Esso negotiated a resolution of the Trustee's claims against Esso and a resolution of Esso's claim

in the CERCLA Action against the Virgin Islands. On or about September 3, 1999, Esso, the Trustee and the Virgin Islands entered into an agreement in principle to settle their claims. *Id.* at p. 92.

129. Thereafter, the Trustee and the Virgin Islands discussed settlement in earnest with Texaco. At a settlement conference held on September 22, 1999, and with the participation and assistance of the Honorable Stanley Brotman and the Honorable Jeffrey Resnick, the Trustee, the Virgin Islands and Texaco agreed in principle to settle the Trustee's claims against Texaco in the NRD/Territorial Law Action and Texaco's claims against the Virgin Islands in the CERCLA Action.

130. Many, if not all, of the non-settling parties were ordered to appear at this settlement conference, including counsel for Gal, Lazare and the Trust, but chose not to participate in settlement negotiations.

131. After reaching the foregoing settlements in principle relating to the claims by and against Esso and Texaco, the Parties negotiated for months and eventually reached agreement upon the terms of the subject Consent Decree.

132. At all times, the settlement negotiations among the parties were conducted at arm's length and in good faith.

133. The Parties reached the settlement reflected in the Consent Decree in the context of very heavily contested litigation. *See id.* at p. 137.

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134. Throughout the negotiations, the Parties had the benefit of the investigations that had been conducted and compiled over the last thirteen years by the federal and territorial governments and of the discovery and more than 40 expert analyses developed and produced in the private party litigation relating to the nature, extent and sources of the contamination at Tutu.

135. After thirteen years of study and more than a decade of litigation, the Parties and Gal, Lazare and the Trust know enough about the contamination at Tutu, including its sources and extent, to evaluate the propriety of the Trustee's settlement demands and the terms of the settlement reflected in the Consent Decree.

136. The assertion by Gal, Lazare and the Trust, as objectors to the Consent Decree, that they lack sufficient information to evaluate the Consent Decree is not meritorious.

F. *Contamination Associated With The Former Laga Facility*

137. Gal and Lazare formed and funded Laga Industries, Ltd., a textile manufacturing company with a plant located in Estate Anna's Retreat, St. Thomas, in 1968. *Tutu*, 994 F. Supp. at 642.

138. To process the cloth before shipment, Laga plant personnel used large quantities of the CVOC perchloroethylene, also known as "perc" or "PCE." *See* Etzel Report (estimating an annual consumption by Laga of 64,400 to

88,800 pounds of PCE at the Laga plant, generating annual "muck" cooker residue with about 5,200 pounds of PCE and total generation of about 24,000 pounds of PCE in a separate emulsion waste).

139. In 1970, Gal and Lazare sold 100% of the stock of Laga to the Duplan Corporation ("Duplan"). *Tutu,* 994 F. Supp. at 642.

140. Gal and Lazare were retained as employees, directors and/or majority shareholders of Duplan. *Id.*

141. Laga was administratively dissolved in 1981 for failure to pay corporate franchise taxes. *Id.* at 643.

142. On August 31, 1976, Duplan filed for Chapter XI reorganization. *Id.* at 642.

143. By Court Order dated October 5, 1976, Duplan's bankruptcy proceeding was converted into a Chapter X proceeding. *Id.*

144. In 1979, Duplan received authorization from the Bankruptcy Court to sell the Laga facility to Panex Co., a partnership composed of Gal and Lazare ("Panex Co."). *Id.* at 642-43.

145. On July 11, 1981, Duplan was renamed Panex Industries, Inc. ("Panex"). Gal and Lazare became the owners of twenty-seven percent of the common stock of Panex. *Id.* at 643.

146. Panex Co. sold the property to the VIDOE in 1982. *Id. See also* Opposition of Gal and Lazare to the joint Motion to Approve and Enter Agreement and Consent Decree, at 5.

147. In its February 18, 1998 opinion, this Court noted the extensive evidence showing the close control Gal and Lazare exercised over the Laga facility: (1) Gal and Lazare initially chose the facility's location based on their experience running a similar textile plant on the Virgin Islands in the 1960s; (2) Gal and Lazare financed the construction of the facility; (3) Gal and Lazare designed the facility, including the number and types of machines; (4) Gal and Lazare made all production decisions; (5) Gal and Lazare determined the price of all manufactured fabrics; (6) Gal and Lazare bought the facility's raw materials, including the PCE (*i.e.* the chemical used to dry clean the fabrics and which is the chemical that is now the primary contaminant of concern at the Tutu Aquifer); (7) Gal and Lazare controlled the facility's costs, including every check in the amount of $500 or more; (8) Gal and Lazare "okayed the layout" of the finishing room where the dry cleaning was done; (9) Gal and Lazare set production schedules and deadlines to which the volume of PCE use was directly tied; (10) Gal and Lazare directed sales and marketing of the finished products; (11) Gal and Lazare reviewed all financial records, including invoices and payroll; and (12) Gal and Lazare hired and routinely communicated with the local management for the facility. *Id.* at 670-71.

148. The deposition testimony, exhibits and expert reports contain substantial evidence that the Laga textile plant used vast amounts of PCE in its manufacturing operations, and support a conclusion, which is not controverted by any

contrary evidence, that the Laga facility released large quantities of this solvent to the environment over a large number of years. *See, e.g.*, Etzel Report (referencing deposition testimony of Winston Smith, Riley Kirk, R. Machacek, A.E. Grieve and Henry Magras). *See also* Forensic Report at 4-1 to 4-4; ENVIRON Liability Report at 3-7; and Kolmer Report at 6-7 and 9-11.

149. PCE degrades in the environment into TCE, DCE and vinyl chloride, all of which have been found in the groundwater downgradient of the Laga facility. *See* Hinchee/ Wiedemeier Report at 2-5 to 2-6 and 3-1 to 3-2; and ENVIRON Liability Report at 3-6.

150. It is also uncontroverted that there is a large amount of PCE beneath the former Laga facility in a highly concentrated dense non-aqueous phase liquid ("DNAPL") form that provides a continuing source of new groundwater contamination. *See* ROD at 6 ("The elevated concentrations of [CVOCs] in groundwater adjacent to and immediately downgradient of the Curriculum Center indicate a high probability that pure product [PCE] is present in the unsaturated zone as dense nonaqueous phase liquid (DNAPL) at the Curriculum Center"); ROD at 8 (the stability and nature of the concentration of CVOCs in the plume originating at the Curriculum Center/former Laga facility indicated a continuing source of CVOCs to the groundwater in the form of DNAPL (pure PCE) in the bedrock); March 19, 1999 results of EPA deep boring samples (Exhibit EE to Opposition) (revealing the presence of massive quantities of CVOCs and DNAPL beneath the former Laga plant); Kolmer Report at 4 ("These data clearly indicate that PCE is present

as a dense non-aqueous phase liquid in the Curriculum Center/LAGA Site area. This finding was confirmed by the newer USEPA groundwater data"); Forensic Report at iii ("EPA's data, which has been independently confirmed through split samples collected by Forensic Environmental Services, Inc. . . . indicate the presence of Dense Non-Aqueous Phase Liquid (DNAPL)" at the Laga/Curriculum Center property) and Section 4.4 (entitled "Spatial Distribution of DNAPL").

151. Both the horizontal and areal distribution and the vertical spatial distribution of PCE below the former Laga plant are consistent with deposition testimony provided by former Laga employees regarding the location of a discharge pit behind (to the north) of the former Laga building. *Id.* at Section 4.4, pages 4-3.

152. The record strongly suggests that operation of the former Laga plant is the source of the most persistent, pervasive and problematic contamination of the Tutu Aquifer.

G. *Contamination Associated With The Curriculum Center (VIDOE)*

153. The Virgin Islands is not a defendant in the NRD/ Territorial Law Action.

154. At the hearing before this Court, the Trustee's counsel explained the basis for not joining the VIDOE as a defendant in the NRD/Territorial Law Action. The Trustee concluded that any soil contamination associated with the operations of the Curriculum Center (as opposed to the

operations of the former Laga plant) did not constitute permanent damage to the natural resources concerned (*i.e.* the deep water aquifer). 2/14/01 N.T. at pp. 90, 93-94 and 97.

155. The discovery record demonstrates that the factual basis for liability on the part of the VIDOE is limited to discharges of paint waste during a limited period of time from a slop sink. The drum storage area was investigated and no contamination above SSLs or impacts to groundwater were documented. *See* Plaintiff's Exhibit 4, Figure 4-1 to the FS Report (Exhibit I) (portraying extremely small location of soil excavation proposed near northeast corner of the Curriculum Center adjacent to the slop sink); and Plaintiff's Exhibit 5, Table 4-5 to the FS (setting forth that only 5 cubic yards of soil at the Curriculum Center required remediation). *See also* 2/14/01 N.T. at p. 87.

156. The discovery record indicates only impacts from non-PCE VOCs to the topsoil near the slop sink. *See* Plaintiff's Exhibits 4 and 5. Any contamination detected was found at depths of less than 0.5 feet below land surface. *Id.* No indications of impact to groundwater were found from the activities related to the VIDOE. *Id.* This record of contamination by the VIDOE pales in comparison to the vast volumes of pure PCE (which is documented to have been bought and used in massive quantities by the Laga facility) released by operations at the Laga plant during the textile plant's lengthy period of operation. *See* ROD at Appendix 2; and Etzel Report.

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H. *Mr. Dema's Representation of the Trustee*

157. Gal, Lazare and the Trust argue that the $9 million settlement reflected in the Consent Decree should be rejected because Mr. Dema was involved in the negotiations as counsel for the Trustee. They have joined in a Motion to Disqualify Mr. Dema as counsel for the Trustee.

158. The Parties to the Consent Decree consented to Mr. Dema's participation for settlement purposes.

159. This Court encouraged all defendants to pursue settlement discussions with the Trustee and his counsel, induding Mr. Dema. Both Judge Brotman and Magistrate Judge Resnick actively facilitated the settlement negotiations. *See* 2/14/01 N.T. at pp. 78, 93, 102 and 137-138.

160. The settlement embodied in the Consent Decree is among the Parties (*i.e.*, the Texaco Parties, the Esso Parties and the Virgin Islands Government). Mr. Dema is not a party to the Consent Decree and is only one of the lawyers representing the Trustee and the Virgin Islands.

161. The Government of the Virgin Islands ("Government") required the services of an attorney with specialized knowledge to assist it in pursuing claims for damages recoverable for contamination to the Tutu Aquifer. *See* Professional Services Contract at 1; 12/14/01 Hearing Transcript at 79-80.

162. The Government lacked the financial resources necessary to advance expenses and pay the customary charges

for said attorney. *See* Professional Services Contract at 2; 12/14/01 Hearing Transcript at 79.

163. Accordingly, the Governor and the Attorney General of the Virgin Islands entered into a Professional Services Contract with John K. Dema providing for his payment, by way of a contingency fee, in the event he succeeded in the litigation. *See* Professional Services Contract at 3-4.

164. Mr. Dema worked under the oversight and supervision of the Virgin Islands Government and the Virgin Islands Attorney General at all times. *Id.* at pp. 80, 82. The Attorney General hired Assistant Attorney General Cisselon Nichols based on her background and experience in environmental matters to oversee this litigation, including supervision of Mr. Dema. *Id.* at pp. 80-81.

165. The Contract provided that "ultimate authority resides in the Attorney General." *Id.* at 7.

166. The Attorney General approved the negotiations as they proceeded and ultimately approved the terms of the settlement. *Id.* at p. 81.

167. The settlement was independently reviewed by the Attorney General of the Virgin Islands, Assistant Attorney General Cisselon Nichols, Esq., who actively participated in all negotiations, H. Marc Tepper, Esq., of the law firm of Buchanan Ingersoll, P.C. in Philadelphia, Dean C. Plaskett, Esq., Commissioner of the DPNR, and Lois Pilgrim Fahie, Esq. and David Bornn, Esq. for the VIHA, in addition to Mr. Dema. *Id.* at pp. 80-82 and 130-131.

168. Based on the proffer of Assistant Attorney General Nichols, I find that the Attorney General's Office supervised and participated in the litigation and made all final decisions with respect to the terms of the consent decree, which also was approved, by the Governor and other pertinent Government officials. *See* 12/14/01 Hearing Transcript at 80-82, 130-131.

169. I further find that the Attorney General's oversight eliminated any possible tension between Mr. Dema's private interests and the Government's obligation to advance the public's interests. *See id.* at 80-82.

170. The Consent Decree's terms provide that the proceeds are to be wired into an account designated by the Trustee. *See* Consent Decree, Section VI.A.

II. Conclusions of Law

A. *Standard of Review*

1. The approval of a consent decree rests within the sound discretion of the District Court. *United States v. Charter Intern. Oil Co.*, 83 F.3d 510 (1st Cir. 1996); *State of Arizona v. Components Inc.*, 66 F.3d 213 (9th Cir. 1995); *United States v. Hercules, Inc.*, 961 F.2d 796 (8th Cir. 1992).

2. In exercising that discretion, a court should recognize that the policy of the law is to encourage settlements. *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F. 3d 275, 280 (1st Cir. 2000); *United States v. Acton Corp.*, 733 F. Supp. 869 (D.N.J. 1990).

3. A district court should grant deference to the action of an agency expert in the subject matter of the Consent Decree as well as the parties' agreement in balancing the competing interests affected by a proposed settlement. *United States v. ASARCO, Inc.*, 814 F. Supp. 951 (D. Colo. 1993).

4. A court should approve a consent decree if it is fair, reasonable and consistent with CERCLA's goals. *See, e.g., United States v. Southeastern Pennsylvania Transportation Authority,* 235 F.3d 817, 823 (3d Cir. 2000) ("*SEPTA*"); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85 (1st Cir. 1991); *United States v. DiBiase,* 45 F.3d 541 (1st Cir. 1995); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409 (6th Cir. 1991); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 680 (D.N.J. 1989).

5. The "fairness" of a consent decree has both procedural and substantive components.

6. Procedural fairness requires that the parties to the decree conduct their negotiations forthrightly to achieve a bargained-for resolution to the suit. *United States v. Atlas Minerals and Chemicals, Inc.*, 851 F. Supp. 639, 653 (E.D. Pa. 1994).

7. In evaluating procedural fairness, a court "should ordinarily look to the negotiation process and attempt to gauge its candor, openness and bargaining balance." *Cannons,* 899 F.2d at 86. *See also United States v. Union Elec. Co.*, 934 F. Supp. 324 (E.D. Mo. 1996), *aff'd,* 132 F.3d 422 (8th Cir. 1997).

8. The consent decree is substantively fair if its terms "are based on comparative fault and if liability is apportioned according to rational estimates of the harm each party has caused." *SEPTA,* 235 F.3d at 823. *See also Cannons,* 899 F.2d at 87.

9. "As long as the measure of comparative fault on which the settlement terms are based is not 'arbitrary, capricious, and devoid of a rational basis,' the district court should uphold it." *SEPTA,* 235 F.3d at 824 (quoting *Cannons,* 899 F.2d at 87).

10. Once the Court determines that a consent decree is based on a rational determination of comparative fault, its task [i]s complete, whether or not it would have employed the same method of apportionment." *SEPTA,* 235 F.3d at 824. *See also Cannons,* 899 F.2d at 88 ("Having selected a reasonable method of weighing comparative fault, the agency need not show that it is the best, or even the fairest, of all conceivable methods. The choice of the yardstick to be used for allocating liability must be left primarily to the expert discretion of the EPA, particularly when the PRPs involved are numerous and the situation is complex") and 90 ("If the figures relied upon derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise.").

11. The presumption in favor of voluntary settlement is particularly strong where the consent decree was negotiated by the Virgin Islands Department of Planning and Natural Resources, an administrative agency with expertise in the environmental arena, and the Territorial Attorney General.

See, e.g., SEPTA, 235 F.3d at 822 (deference to agency); *Akzo Coatings,* 949 F.2d 1409 (presumption particularly strong where a consent decree has been negotiated by an agency like EPA which enjoys substantial expertise in the environmental field); *Cannons,* 899 F.2d at 84 (policy of encouraging settlements "has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement"). *See also* 2/14/01 N.T. at p. 92 (the original Trustee, Beulah Dalmida-Smith, possessed an advanced degree from Yale in environmental sciences; the current Trustee, Dean Plaskett, did enforcement work for the DPNR before being elevated to DPNR Commissioner).

12. Where the involvement of governmental actors was combined with that of numerous attorneys, all with competing interests, in what was irrefutably arm's length negotiations, a court's deference to the terms of the consent decree is heightened:

> Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the balance. [. . .] The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed

> decree is fair, reasonable, and faithful to the objectives of the governing statute.

Cannons, 899 F.2d at 84 (internal citations omitted). *See also* 2/14/01 N.T. at p. 93 (describing sophisticated players playing with cards dealt face up).

13. It is well-settled law that a non-settling party cannot successfully oppose a consent decree simply because the non-settlor may bear the burden and/or risk of paying more. *See, e.g., SEPTA,* 235 F.3d at 824 ("the statutory scheme contemplates that those who are slow to settle ought to bear the risk of paying more") *(quoting DiBiase,* 45 F.3d at 546); *United States v. Occidental Chem. Corp.*, 200 F.3d 143, 150 n.8 (3d Cir. 1999) (the "intended effect" of CERCLA "is that 'non-settling defendants may bear disproportionate liability for their acts'") *quoting B.F. Goodrich v. Betkoski,* 99 F.3d 505, 527 (2d Cir. 1996)); *Cannons,* 899 F.2d at 89 ("[t]hat the cost of purchasing peace may rise for a laglast is consistent with the method of the statute").

14. "In most instances, settlement requires compromise. Thus, it makes sense for the government, when negotiating, to give a PRP [potentially responsible party] a discount on its maximum potential liability as an incentive to settle." *SEPTA,* 235 F.3d at 824.

15. Whenever a non-settling party is barred from bringing a contribution action and work remains to be done, its future liability may exceed current estimates. That possibility does not render a consent decree unfair. *Id.* at 825.

16. The court may either approve or disapprove the settlement; it may not rewrite it." *United States v. BASF-INMONT Corp.*, 819 F. Supp. 601, 608 (E.D. Mich. 1993), *quoting Harris v. Pensley,* 654 F. Supp. 1042,1049 (E.D. Pa.), *aff'd*, 820 F.2d 592 (3d Cir.), *cert. denied,* 484 US. 947 (1987).

17. The function of the court is not to substitute its judgment for that of the parties to the decree, but to search for significant errors in judgment or procedure. *BASF-INMONT,* 819 F. Supp. at 608.

18. The Court's task "is to determine whether the settlement represents a reasonable compromise, all the while bearing in mind the law's generally favorable disposition toward the voluntary settlement of litigation and CERCLA's specific preference for such resolution." *United States v. Kramer,* 19 F. Supp. 2d 273, 281 (D.N.J. 1998) (*quoting Rohm & Haas,* 721 F. Supp. at 680-81).

19. "The Court does not have the duty to reconstruct the settlement process and review the allocated shares with mathematical exactitude by delving into the data and reports upon which the settling parties based their negotiations." *Kramer,* 19 F. Supp. 2d at 281.

20. A district court's "reasonableness" inquiry, like that for fairness, is a pragmatic one, not requiring precise calculations. *Charter Intern. Oil*, 83 F.3d at 521; *Kramer,* 19 F. Supp. 2d at 286.

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21. A district court's "reasonableness" inquiry involves factors such as the relative strength of the parties' litigating positions and the costs and complexity of protracted litigation.

22. "In a nutshell, the reasonableness of a proposed settlement must take into account foreseeable risks of loss." *Cannons,* 899 F.2d at 90.

23. If the government's case is less than robust, or the outcome problematic, a reasonable settlement should mirror such factors. *Id.*

24. With respect to consistency with statutory goals, the matter is simply one of fidelity to the broad statutory policies. The decree should further the larger purposes of giving the government promptly the tools to respond to environmental problems and ensuring that parties bear the costs of contaminating the environment. *Id.*; *Atlas Minerals,* 851 F. Supp. at 655.

25. Courts have held that the existence of an extensive factual record provides a sufficient foundation for the parties to reach an informed settlement. For example, in *United States v. SCA Services of Ind., Inc.*, 827 F. Supp. 526, 533 (N.D. Ind. 1993), the court found that the settlement was substantively fair because the parties had available to them the benefit of the "substantial discovery" which took place over the course of the litigation:

> Indeed, more discovery could conceivably lead to new evidence which could influence the wisdom of these proposed settlements; however, the

amount of discovery conducted to date has provided a reasonable basis for these settlements.

See also Components, 66 F.3d at 215 (upholding fairness of settlement agreement where state had sufficient information on extent of contamination and cost of cleanup from the preliminary assessments and site investigations, collected aerial photos, and detailed information on property ownership, manufacturing processes and chemical usage for facilities in the area); and 2/14/01 N.T. at p. 65 (describing the record here as "replete with scientific evidence").

26. "Courts have long recognized a strong federal interest in promoting settlement. . . . This is especially true in complex CERCLA litigation which would place an enormous strain on the judicial caseload if settlements were not encouraged." *SCA,* 827 F. Supp. at 531 (internal citations omitted).

B. ***Procedural Fairness***

27. In the present case, the process of settlement began in earnest in March 1999 at a meeting of counsel for all the parties held at the Department of Justice in Washington, D.C.

28. At that point in time, the contamination at Tutu had been studied for almost twelve years, and the parties had available to them enormous amounts of factual testimony and scientific studies (developed over the course of almost twelve years of governmental and private party investigation and discovery) to use to assess their exposure in the two subject lawsuits.

29. At the March 1999 meeting, counsel for the Trustee presented the results of a preliminary damage assessment prepared by the Trustee's experts and proposed settlement contributions for each of the defendants named in the Trustee's suit. *See* Plaintiff's Exhibits 1, 2 and 3.

30. From that point, each party was free to engage in settlement negotiations with the Trustee and the Virgin Islands. Esso and Texaco chose to pursue those discussions; Gal, Lazare and the Trust elected not to do so. *See, e.g.*, 2/14/01 N.T. at pp. 92-93.

31. During the September 22, 1999 settlement conference before the Honorable Stanley Brotman and the Honorable Jeffrey Resnick, at which time the settling parties had agreed to enter into a settlement in principle, the non-settling objectors refused to discuss settlement.

32. The Virgin Islands, the Trustee, Esso and Texaco eventually agreed upon and signed the Consent Decree.

33. The Virgin Islands (including the Department of Education and VIHA) and the Trustee were represented by able and experienced counsel, including Cisselon Nichols of the Office of the Attorney General; Dean C. Plaskett, Commissioner of the DPNR; John K. Dema of St. Croix; H. Marc Tepper of the law firm of Buchanan Ingersoll, P.C. in Philadelphia; Lois Pilgram-Fahie and David A. Bornn of St. Thomas for the VIHA.

34. The Consent Decree has been approved by the Honorable Iver Stridiron, Attorney General of the Virgin Islands.

35. Esso was represented by Kell Damsgaard and Glen Stuart of the law firm of Morgan, Lewis & Bockius LLP in Philadelphia and Douglas Capdeville of St. Croix.

36. Texaco was represented by Donald Stever of the law firm of Dewey Ballantine LLP in New York, Treston Moore of Moore & Dodson in St. Thomas, and Timothy R. Knutson of Texaco.

37. Counsel have signed the Consent Decree, which states: "This Consent Decree has been negotiated in good faith at arm's length. . . ."

38. In *Atlas Minerals,* 851 F. Supp. at 653, the Court stated: "Absent some hint or allegation of collusion or unfairly disproportionate bargaining power, this court will accept the parties' representations that the negotiations were fair."

39. Based on this record, this Court concludes that the Consent Decree is the result of a procedurally fair negotiation process encouraged and facilitated by the Court and conducted at arm's length by experienced counsel with the benefit of more than a decade of environmental study of the contamination at Tutu, numerous expert consultants and extensive discovery.

C. *Substantive Fairness*

40. In the Consent Decree, Esso and Texaco agreed to make payments of $6,100,000 and $3,195,000, respectively, to settle the Trustee's claims in the NRD/Territorial Law

Action. Esso and Texaco also agreed to release their claims against the Virgin Islands in the CERCLA Action in exchange for receipt of $195,000 each.

41. The Court concludes that these key terms and the others set forth in the Consent Decree are fair, reasonable and in the public interest in light of: (i) the results of the investigations undertaken at Tutu; (ii) the actions of Esso and Texaco in responding to and remediating the contamination and resolving the private party litigation; and (iii) the litigation risks that are inherent in trying to prove and defend the various claims.

42. In the ROD, the EPA found after many years of study that the contamination at Tutu primarily consists of two types: CVOCs and petroleum-related compounds.

43. The petroleum contamination is in two plumes, one beneath Texaco Tutu and one beneath Esso Tutu. While Esso and Texaco recognize that gasoline was spilled years ago to create the petroleum-related plumes, the tanks and lines have been replaced, and Esso and Texaco claim this has solved the problem. Moreover, Texaco and Esso assert that the petroleum-related plumes are of minor significance for the Trustee's claims based upon the CERCLA statute for four reasons.

44. First, petroleum is not a hazardous substance under CERCLA. There is a specific petroleum exclusion in CERCLA from liability for release of petroleum products. *See* 42 U.S.C. § 9601(14). *See, e.g.*, 2/14/01 N.T. at pp. 98 and 101-102. As such, a Trustee cannot recover under

CERCLA for damages to natural resources caused by petroleum alone.

45. Second, Esso and Texaco assert that each petroleum-related plume is of relatively small extent and effect, being localized in the vicinity of the associated service station. *Id.* at 102.

46. Third, Esso and Texaco believe (though the DPNR and Trustee are less hopeful) that the petroleum-related plumes can and will be cleaned up so that any resource damages occasioned thereby are temporary, not permanent. *Id.*

47. Fourth, Texaco and Esso have constructed and are currently operating treatment systems to remediate the localized petroleum-related plumes. *Id.*

48. At a minimum, these arguments by Esso and Texaco inform the Trustee that there are risks inherent in litigating his federal claim and that some compromise in the claim is fair exchange for avoiding those risks.

49. Further, it seems clear that the value of the Trustee's claim turns, in large part, on the effects of the CVOC plumes at Tutu.

50. This is because CVOCs are classified as hazardous substances under CERCLA; it is that contamination that has spread through the aquifer; and it is that contamination that poses the most difficulty in trying to restore the aquifer.

Appendix B

51. EPA's recent test results concerning the area beneath the former Laga plant strongly suggest that the operation of the former Laga plant was the most significant source of CVOCs to the groundwater at Tutu. *See* March 19,1999 EPA Materials. *See also* Etzel Report; and Forensic Report.

52. Based upon the results of the investigation overseen by EPA, the Trustee did not join the VIDOE as a defendant in the NRD/Territorial Law Action because the operations of the Curriculum Center did not cause permanent damage to the natural resources concerned (i.e. the deep water aquifer). 2/14/01 N.T. at pp. 90, 93-94 and 97.

53. Given the limited contamination of the topsoil associated with the operations of the Curriculum Center, Esso and Texaco elected to settle their claims against the VIDOE for $195,000 each.

54. The other significant CVOC polluter, as found by the EPA, is O'Henry Dry Cleaners, operated by L'Henri.

55. According to the EPA and many experts, L'Henri has contributed large quantities to the southern CVOC plume.

56. Gal, Lazare, the Trust and L'Henri are not parties to the Consent Decree.

57. Thus, the parties contributing the most significant quantities of CVOCs, the contaminants that are most difficult to remediate, continue to be subject to the NRD/Territorial Law Action.

58. Texaco and Esso, on the other hand, assert that there is little evidence that they caused CVOC contamination of the groundwater. Texaco notes that EPA has never stated that Texaco was a contributor of chlorinated contamination to the groundwater or soil at Tutu. *See* RI at 5-58. *See also* 2/14/01 N.T. at pp.101-102. Esso notes that tests of groundwater upgradient and downgradient of its service station show no increase in CVOC contamination. *See* RI at 5-58. *See also* 2/14/01 N.T. at p. 99.

59. Without deciding the accuracy of these assertions, they again raise issues which a rational Trustee would consider a litigation risk to be considered in settlement discussions.

60. Finally, it is relevant that Texaco and Esso (as well as Gal and Lazare) already have settled with the parties whose water wells and real property were or may have been affected by the contamination in the private party litigation.

61. In assessing his settlement position, the Trustee performed an analysis of a number of factors (*i.e.*, toxicity and carcinogenicity, volume, financial resources, knowledge or acquiescence, and degree of non-cooperation) to calculate percentage shares for Texaco, Esso, Francois and L'Henri, and Laga. *See* 2/14/01 N.T. at p. 89; and Plaintiff's Exhibit 2.

62. Applying that analysis to the damage figures developed by its expert, Industrial Economics, for use-related NRD losses, the Trustee made settlement demands to each of the parties, including Texaco and Esso. *Id.*

Appendix B

63. The Trustee allocated a total percentage share of 65% to Esso and Texaco. Plaintiff's Exhibit 2. *See* Plaintiff's Exhibit 2.

64. Esso and Texaco, however, had their own expert, ENVIRON, advising them with respect to fair allocation shares for response to the contamination at Tutu. ENVIRON allocated a total percentage share to Esso and Texaco combined of 25%. ENVIRON Report.

65. Whether the Court perceives the combined $9,295,000 settlement by Esso and Texaco of the NRD/Territorial Law Action as more than 50% of the "use related losses" estimated by the Trustee ($16.9 million) or approximately 25% of the "use" and "non-use" losses estimated by the Trustee ($37 million), the Consent Decree respects the expert allocation and therefore reflects a settlement that is based on a rational factual and legal basis, especially when adjustments for litigation risk are factored in the calculus.

66. In their opposition to the motion to approve the Consent Decree, Gal, Lazare and the Trust claim that there is insufficient information to assess the fairness of the settlement. That argument lacks merit. Given the history of the Site, there exists a wealth of information upon which to assess the value of the cost recovery and natural resource damage claims and to evaluate the fairness of the settlement amounts.

67. This Site has been the subject of administrative and judicial legal proceedings for over a decade involving over a

hundred fact depositions, countless liability and damage expert reports and depositions, and hundreds of thousands of documents exchanged. Moreover, the EPA, DPNR and the civil litigants have investigated and tested the Site for more than twelve years.

68. In making their objections to the Consent Decree, Gal, Lazare and the Trust presented no expert testimony or factual evidence. Their objections failed to state whether they believe Esso and Texaco paid too little or too much to resolve the Trustee's claims in the NRD/Territorial Law Action.

69. Given all the factors and arguments discussed above, the Court concludes that the agreement of Esso and Texaco to pay $9,295,000 to settle the Trustee's claims in the NRD/Territorial Law Action is eminently fair, reasonable and in the public interest.

70. Given all the factors and arguments discussed above, the Court concludes that the agreement of the VIDOE to pay a total of $390,000 to Esso and Texaco (*i.e.*, $195,000 each) reflects an appropriate compromise of the cost recovery claims asserted by Esso and Texaco against the VIDOE in the CERCLA Action.

71. It is consistent with the primary precept of fairness that liability should be apportioned among the parties "according to rational (if necessarily imprecise) estimates of how much harm each [potentially responsible party] has done." *See Union Elec.*, 934 F. Supp. at 328, 329; *Cannons*, 899 F.2d at 88 (settlements based upon volumetric estimates of contribution to the contamination are fair).

72. It is also reasonable because it recognizes the litigation risks and the settlement avoids the costs and burdens of extremely protracted litigation.

73. Finally, the settlement comports with the public interest favoring settlement because it provides prompt resolution of the environmental claims and accountability.

74. The court in *SCA,* 827 F. Supp. at 533, found that a consent decree was in the public interest because it would, among other things, achieve early resolution of the case as between the settling parties. This applies with equal force to the Consent Decree in this case, which furthers the public interest because it will result in the payment of $9,295,000 for the settlement of the Trustee's claims against Esso and Texaco in the NRD/Territorial Law Action without protracted litigation. This interest is heightened here, where parties like Gal and Lazare have failed to provide any support or funding at this Site.

75. To the extent there are unreimbursed natural resource damages or other damages, the parties primarily responsible for those damages, Gal, Lazare and the L'Henri parties, remain in the case.

76. To the extent there may be any suggestion the claims were undervalued, the objectors will not be unduly prejudiced by this settlement.

77. Section IX of the Consent Decree provides only the Texaco Parties and the Esso Parties, not the Virgin Islands or the L'Henri parties, contribution protection under Section 113(f)(2) of CERCLA.

78. Moreover, under Territorial and common law, Gal, Lazare and the Trust will be entitled to offset the Trustee's natural resource damage claim by the settling parties' percentage of liability. *See* Rest. (Third) of Torts-AL § 16, and cmt. c. (plaintiff's recoverable damages from jointly and severally liable tortfeasor reduced by comparative share of damages attributable to settlor);1 V.I.C. § 4 (rules of common law as expressed in restatements are rules of decision in the courts of the Virgin Islands).

79. Gal, Lazare and the Trust oppose the settlement on the ground the Consent Decree allegedly lacks assurances that the monies will be used by the Virgin Islands for proper CERCLA purposes. On its face, however, the Consent Decree contains adequate assurance that this money will be properly apportioned. The Consent Decree explicitly states that it was negotiated "to promote or facilitate restoration and/or replacement of the Natural Resources". Section I(B). Moreover, the Consent Decree also assures that it does not "in any way . . . relieve the Virgin Islands . . . from obligations to comply with any applicable federal, state, territory, or local law, rules, regulations, and administrative procedures". Section XIV.

80. Further, the Court accepts that both the Trustee and the Attorney General are aware of their obligations and duties under the law pertaining to NRD settlements. *See* 2/14/01 N.T. at p. 84.

81. Thus, the record does not support the objectors' contention that "[t]here is no where [sic] any suggestion that the Trustee even intends to use the Settlement fund in

accordance with the purposes of CERCLA." The Consent Decree is explicit on this point.

82. Moreover, the Court recognizes that the Consent Decree not only resolves CERCLA claims, but also resolves natural resource damage claims which are premised upon common law claims. Consent Decree, p. 2 and §§ II.C., VIII.A.1., IX. There is no parallel requirement under common law to that of CERCLA that the damage recovery be used to restore, replace or acquire the equivalent of the natural resource. The proper use of the settlement proceeds is therefore peculiarly within the expertise of the agency involved, the DPNR.

83. Gal, Lazare and the Trust have not raised any credible grounds to challenge the Virgin Islands' good faith or to conclude that the Virgin Islands will not use the funds in accordance with the law. Any argument at this juncture that the Virgin Islands Government will not do so is speculative and hypothetical, and poses no reason to reject the Consent Decree.

D. *Mr. Dema's Representation of the Trustee*

84. Gal, Lazare and the Trust object to entry of the Consent Decree due to the involvement of Mr. Dema in the negotiation of the Consent Decree on the Trustee's behalf.

85. It is permissible for the Parties to consent to waive any claims of conflict for the limited purpose of pursuing settlement options. *See* Model Rules of Professional Conduct 1.7(a)(2) and (b)(2) (a client may consent to a representation notwithstanding a conflict).

86. Moreover, the objectors do not state any claim of prejudice to themselves as a result of Mr. Dema's involvement in a settlement agreement involving other parties.

87. The only parties who might have been prejudiced in this context were those who are parties to the Consent Decree — all of whom have *waived* the issue for settlement purposes.

88. Any argument at this juncture about whether or how Mr. Dema will be paid is irrelevant to the determination of the present judicial inquiry.

89. If Gal, Lazare and the Trust believe they have a viable disqualification claim against Mr. Dema in the NRD/Territorial Law Action, they will have an opportunity to pursue their claim in the context of that litigation.

90. This Court's consideration of the Motion to Approve the Agreement and Consent Decree is not the proper time to address the substance of any such *motion* to disqualify.

91. In sum, the Court concludes that the Consent Decree is fair, reasonable and in the public interest and that the opposition to it lacks merit.

THEREFORE, the Court hereby approves and orders entry of the Consent Decree; and pursuant to Rule 54(b), the Court expressly directs that the Consent Decree be and hereby is a final judgment.

Appendix B

ENTER:

DATED: October 15, 2001

s/ Raymond L. Finch
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

ATTEST:
WILFREDO MORALES
Clerk of the Court

by: s/ Margaret Brown
Deputy Clerk

Appendix B

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CIVIL NO. 1998/206

COMMISSIONER OF THE DEPT. OF PLANNING & NATURAL RESOURCES, DEAN C. PLASKETT, in his capacity as Trustee For Natural Resources of the Territory of the Virgin Islands

Plaintiff,

v.

ESSO STANDARD OIL, S.A., LTD., et al.,

Defendants.

and

MASTER DOCKET NO. 1989-107-1227
CIVIL NO. 1996-0054(B)

IN RE: TUTU WATER WELLS CERCLA LITIGATION

ORDER

Pursuant to this Court's Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the Consent Decree filed on October 18, 2000 is hereby APPROVED; and it is further

ORDERED that the Consent Decree be and hereby is a final judgment.

Appendix B

ENTER:
s/ Raymond L. Finch
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

DATED: October 15, 2001

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 21, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-4176 & 01-4204
(D.C. Civ. Nos. 98-cv-00206 & 96-cv-00054)

IN RE: TUTU WATER WELLS CERCLA LITIGATION

COMMISSIONER OF THE DEPT. OF PLANNING & NATURAL RESOURCES, DEAN C. PLASKETT, in his capacity as Trustee for Natural Resources of the Territory of the United States Virgin Islands

v.

ESSO STANDARD OIL S.A., LTD; ESSO VIRGIN ISLANDS, INC.; ESSO STANDARD OIL COMPANY (PUERTO RICO); TEXACO CARIBBEAN, INC.; TEXACO PUERTO RICO; THE SUCCESSOR PANEX INDUSTRIES STOCKHOLDERS LIQUIDATING TRUST; MICHAEL D. DEBAECKE, ESQ., IN HIS CAPACITY AS TRUSTEE OF THE SUCCESSOR PANEX INDUSTRIES, INC. STOCKHOLDERS LIQUIDATING TRUST; PANEX CO; THE ESTATE OF PAUL LAZARE BY ITS EXECUTORS, NORMAN HALPER and OLIVER LAZARE; ANDREAS GAL; L'HENRI, INC. D/B/A O'HENRY CLEANERS

SUR PETITION FOR PANEL REHEARING

Appendix C

Present: SCIRICA, *Chief Judge*, ALITO and
McKEE, *Circuit Judges*

The petition for rehearing filed by appellants/cross-appellees, Andreas Gal, The Estate of Paul Lazare by its Executors Norman Halper and Oliver Lazare, and Panex Co., in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT,

s/ Scirica
Chief Judge

DATED: May 21, 2003

(2)
Supreme Court, U.S.
FILED
SEP 16 2003
OFFICE OF THE CLERK

No. 03-325

IN THE

Supreme Court of the United States

ANDREAS GAL, NORMAN H. HALPER and OLIVER LAZARE, as Executors of the Estate of PAUL LAZARE, and PANEX CO.,
Petitioners,

v.

DEAN C. PLASKETT, as Trustee for the Natural Resources of the Territory of the Virgin Islands, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

IVER STRIDIRON
Attorney General
Territory of the U.S. Virgin Islands
U.S.V.I. Department of Justice
48B-50C Kronprindsens Gade
GERS Complex
Charlotte Amalie,
St. Thomas, USVI 00802
Counsel for Trustee

KELL M. DAMSGAARD
Counsel of Record
GLEN R. STUART
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Counsel for Esso Virgin Islands, Inc., Esso Standard Oil Co. (Puerto Rico) and Esso Standard Oil S.A. Ltd

JOHN K. DEMA
Law Offices of John K. Dema, P.C.
1236 Strand Street, Suite 103
Christiansted,
St. Croix, USVI 00820
Counsel for Trustee

DONALD W. STEVER
DEWEY BALLANTINE LLP
1301 Avenue of the Americas
New York, NY 10019
Counsel for Texaco Caribbean, Inc., Texaco Puerto Rico, Inc. and Texaco, Inc.

JOHN A. ZEBEDEE
HYMES & ZEBEDEE, P.C.
No. 10 Norre Gade, 3rd Floor
Charlotte Amalie,
St. Thomas, USVI 00804
Counsel for Vernon Morgan

[Additional Attorneys Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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H. MARC TEPPER
BUCHANAN INGERSOLL
11 Penn Center, 14th Floor
1835 Market Street
Philadelphia, PA 19103

Counsel for the Virgin Islands Department of Education

DAVID A. BORNN
THE BORNN LAW FIRM, P.L.L.C.
No. 8 Norre Gade
2nd Floor
St. Thomas, USVI 00802

Counsel for Virgin Islands Housing Authority

Attorneys for Respondents

QUESTIONS PRESENTED

Where numerous settling parties in two related environmental actions under the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, submitted an extensive two-volume appendix in support of their joint motion for judicial approval of their consent decree ending more than a decade of litigation, several non-settling parties submitted no documentary record in opposition to the joint motion, and the non-settling parties no longer challenge the lower courts' approval of the CERCLA consent decree but rather seek this Court's review of the district court's factual findings due to their concern about the potential impact of those findings in future proceedings:

1. Did the court of appeals apply the proper standard of review in affirming the district court's approval of the CERCLA consent decree?

2. Did the court of appeals properly reject as baseless the non-settling parties' assertion that the findings set forth in the district court's opinion were erroneous?

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondents state as follows:

Esso Standard Oil Co. (Puerto Rico) is an indirect subsidiary of Exxon Mobil Corporation. Esso Standard Oil S.A. Ltd. is a direct subsidiary of Exxon Mobil Corporation. Esso Virgin Islands, Inc. is a direct subsidiary of Exxon Mobil Corporation.

Texaco Inc. identifies the following parent corporations: Chevron Asiatic Limited, ChevronTexaco Overseas Petroleum Inc., and ChevronTexaco Corporation. Texaco Caribbean Inc. identifies the following parent corporations: ChevronTexaco Global Energy Inc., Texaco Overseas Holdings Inc., TRMI Holdings Inc., Texaco Inc., Chevron Asiatic Limited, ChevronTexaco Overseas Petroleum Inc., and ChevronTexaco Corporation. Texaco Puerto Rico Inc. identifies the following parent corporations: Texaco Estrella Puerto Rico Inc., ChevronTexaco Global Energy Inc., Texaco Overseas Holdings Inc., TRMI Holdings Inc., Texaco Inc., Chevron Asiatic Limited, ChevronTexaco Overseas Petroleum Inc., and ChevronTexaco Corporation.

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IN THE

Supreme Court of the United States

No. 03-325

ANDREAS GAL, NORMAN H. HALPER and OLIVER LAZARE, as Executors of the Estate of PAUL LAZARE, and PANEX CO.,
Petitioners,

v.

DEAN C. PLASKETT, as Trustee for the Natural Resources of the Territory of the Virgin Islands, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In their Petition for a Writ of Certiorari ("Petition"), petitioners Andreas Gal, Norman H. Halper and Oliver Lazare as Executors of the Estate of Paul Lazare, and Panex Co. (the "Laga Parties") ask this Court to grant certiorari to review only that portion of the court of appeals' opinion relating to the district court's findings of fact and conclusions of law supporting its approval of the consent decree. Petitioners expressly do not challenge the court of appeals' affirmance of the district court's decision approving the respondents' consent decree. Petitioners' concern is not the relief granted below, but the potential effect the findings of fact and conclusions of law might have on the non-settling Laga Parties in subsequent proceedings. Given that petitioners do

not attack the approval of the consent decree, and only raise hypothetical concerns about the potential effect of the district court's underlying findings and conclusions in subsequent proceedings, petitioners do not raise an issue that merits this Court's review. Moreover, both the district court and the court of appeals properly rejected the arguments presented, without any documentary support, by the non-settling Laga Parties in response to the well-documented joint motion of respondents to approve the CERCLA consent decree.

A. Proceedings in the District Court

On October 18, 2000, plaintiff, Commissioner of the Department of Planning and Natural Resources, Dean C. Plaskett, in his capacity as Trustee for the Natural Resources of the Territory of the United States Virgin Islands ("Trustee"); the Territory of the United States Virgin Islands (the "Virgin Islands"), including the Department of Education ("VIDOE"), Department of Planning and Natural Resources ("DPNR"), and the Virgin Islands Housing Authority ("VIHA"); Esso Virgin Islands, Inc., Esso Standard Oil Co. (Puerto Rico), and Esso Standard Oil S.A. Ltd. (collectively "Esso"); Texaco Caribbean, Inc., Texaco Puerto Rico, Inc. and Texaco, Inc. (collectively "Texaco"); and Vernon Morgan (collectively "the Settling Parties") filed a joint motion (the "Joint Motion") with the district court to approve and enter the Agreement and Consent Decree ("Consent Decree"). (A1213-A2013) The purpose of the Consent Decree was to settle the Settling Parties' differences in two lawsuits, Civil No. 1998/206 ("NRD Action") and Civil No. 1996/0054(B) ("CERCLA Action").

In support of their Joint Motion, the Settling Parties filed a two-volume Appendix (A1218-A2013), including the Consent Decree, key documents from the Administrative Record compiled by the U.S. Environmental Protection Agency ("EPA") and the Settling Parties during their extensive

investigation of the Tutu Wellfield Site ("Tutu Site"), and expert reports prepared in the CERCLA Action. The Settling Parties' February 28, 2000 Memorandum of Law in Support of Joint Motion ("Supporting Memorandum") (A232) also described the Trustee's retention of experts to assess the value of the natural resource damages ("NRDs"). In particular, the Trustee hired Industrial Economics, Inc., specialists in natural resource economics and damages, to develop a preliminary assessment, which included two damage components—"use related loss" of $16.9 million and "non-use related loss" of $19 million. (A232)

On or about January 19, 2001, three non-settling parties, Andreas Gal ("Gal"), the Estate of Paul Lazare ("Lazare"), and the Successor Panex Industries, Inc. Stockholders' Liquidating Trust (the "Successor Trust"), filed oppositions to the Joint Motion. (A2016-A2049) They objected to the Consent Decree on two grounds: (i) the record "fail[s] to provide sufficient information upon which to evaluate whether the settlement terms are fair and reasonable;" and (ii) the involvement of John K. Dema, one of several attorneys representing the Trustee, was not appropriate. The non-settling parties did not submit any documents, expert reports or other evidence to support their opposition to the Consent Decree.

On or about February 6, 2001, the Settling Parties filed reply memoranda. (A2064-A2085; A2086-A2095) In addition to the two-volume Appendix already provided in support of the Joint Motion, Esso and Texaco referred the court to eight volumes of exhibits they had previously filed with the court in opposition to other motions filed in the CERCLA Action, providing additional evidence demonstrating the substantial responsibility of the former Laga facility for the contamination at Tutu. (A2068)

The district court scheduled a hearing on the Joint Motion for February 14, 2001. (A2045) At the hearing, the Trustee

presented five additional exhibits. (A2180, A2243-A2279) Although the district court afforded the Laga Parties a full opportunity to do so, the Laga Parties once again elected not to present any exhibits. (A2167-A2168, A2239-A2240)

The district court issued an Order on February 20, 2001 directing the parties to submit proposed findings of fact and conclusions of law. (A2280) The Settling Parties did so, with detailed supporting citations to the documentary record, on March 16, 2001. (A2282-A2343) The Laga Parties also submitted proposed findings of fact and conclusions of law (A2344-A2357), but they made no meaningful attempt to provide a factual response to the Settling Parties' factual findings to which they now take exception. Indeed, during the district court's consideration of the Joint Motion, the Laga Parties never provided any citations to the deposition testimony they included in the Appendix on appeal. (A237-A617, A650-A807, A1130-A1212, A2364-A2372)

Eight months after the February hearing, on October 15, 2001, the district court issued its Memorandum Opinion and Order approving the Consent Decree and entering it as a final judgment. (A5-A53) In doing so, the district court adopted most, but not all, of the Settling Parties' proposed findings of fact and conclusions of law. The Laga Parties' appeal followed.

B. The Court of Appeals' Decision

The court of appeals unanimously affirmed. Pet. App. 1a-14a. The court of appeals addressed the questions presented by the Laga Parties' appeal: (1) whether the district court properly held that the CERCLA consent decree was fair, reasonable, and in the public interest; and (2) whether the district court erred by approving the CERCLA consent decree without holding a full evidentiary hearing. Pet. App. 5a.

On the first issue, the court of appeals identified the proper standard of review for appellate review of judicial approval of

consent decrees in CERCLA actions and the principle that "[a] court should approve a consent decree if it is fair, reasonable, and consistent with CERCLA's goals." Pet. App. 7a. After noting the extensive documentary record presented by the Settling Parties in support of their motion to approve the Consent Decree (Pet. App. 3a),[1] the court of appeals observed that "the Laga Parties offered no factual or documentary support for their arguments before the District Court." Pet. App. 8a.[2] After reviewing the evidence offered by the Settling Parties, the absence of evidence offered by the Laga Parties, as well as the procedural and substantive fairness of the Consent Decree, the court of appeals found that the district court had not abused its discretion in approving the Consent Decree. Pet. App. 11a.

In Section III of its opinion, the court of appeals considered the second issue raised by the Laga Parties' appeal, *i.e.*, "the Laga Parties challenge the District Court's failure to hold a full evidentiary hearing prior to adopting the findings and conclusions, asserting they suffered 'deprivations of the rights to due process to which [they] are entitled under the

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[1] The court of appeals expressly noted that "[i]n support of their joint motion to the District Court, the Settling Parties filed a two-volume appendix, including the consent decree and various EPA and other expert reports." Pet. App. 3a. *See also* Pet. App. 12a ("The Settling Parties produced an extensive documentary record to support their joint motion. The record included exhibits, expert reports, and deposition testimony detailing the fruits of more than a decade of environmental investigation at the Tutu site.").

[2] The court of appeals further observed that the Laga Parties "elected not to offer any expert witnesses and submitted no expert reports to challenge those submitted by the Settling Parties. While they provide express references to deposition testimony to this court on appeal, they failed to do so before the District Court." Pet. App. 8a. *See also* Pet. App. 12a ("In contrast, the Laga Parties presented no competing documents, testimony, or analysis. They merely contested the Settling Parties' evidence as insufficient and replete with errors.").

U.S. Constitution.'" Pet. App. 11a-12a. After emphasizing CERCLA's encouragement of fair and efficient settlements and the district court's provision to the Laga Parties of "an opportunity to submit evidence and present arguments to challenge the proposed CERCLA consent decree[,]" the court of appeals properly recognized that "[t]he Constitution does not require the court to conduct a full and formal evidentiary hearing to satisfy due process concerns." Pet. App. 12a.[3] The court of appeals then held that "[t]he decision whether to hold a full-blown evidentiary hearing is committed to the sound discretion of the District Court." Pet. App. 12a. It found that the district court properly exercised its discretion and, therefore, found "no violation of the Laga Parties' due process rights." Pet. App. 12a.[4]

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[3] Citing *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1017 (8th Cir. 2002) ("It is within the sound discretion of the trial court to decide whether an evidentiary hearing is necessary before ruling on a proposed consent decree."). *See also United States v. Cannons Engineering Corp.*, 899 F.2d 79, 94 (1st Cir. 1990) (recognizing the "proposition that 'motions do not usually culminate in evidentiary hearings'" and observing that "[d]istrict courts are busy places and makework hearings are to be avoided"); and *United States v. Charles George Trucking*, 34 F.3d 1081, 1085 (1st Cir. 1994) ("Requiring hearings to review the reasonableness of CERCLA consent decrees as a matter of course would frustrate the statutory objective of expeditious settlement. [Citation omitted.] Consequently, requests for evidentiary hearings are, for the most part, routinely denied—and properly so—at the consent decree stage in environmental cases.").

[4] The Laga Parties cite *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001), for the proposition that it is "a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings." Petition at 5. However, the *Microsoft* case did not involve the court's review and approval of a CERCLA consent decree, but rather the entry of injunctive relief against Microsoft in a federal antitrust action. No injunctive relief has been entered against the Laga Parties here.

The court of appeals then addressed the Laga Parties' complaint that the district court had "erred by adopting nearly verbatim all of the factual findings and conclusions of law submitted by the Settling Parties[.]" Pet. App. 13a. It once again emphasized that "the Laga Parties failed to submit deposition testimony, expert reports, or analysis to support their criticism of the Settling Parties' evidence, and were afforded ample opportunity to be heard prior to and on February 14, 2001." Pet. App. 13a. At the end of Section III, the court of appeals unanimously found "no abuse of discretion" on the second issue presented by petitioners' appeal, *i.e.*, whether the district court erred in entering findings of fact and conclusions of law without holding a full evidentiary hearing. Pet. App. 14a.

At the end of its opinion, the court of appeals dropped a final footnote to address the Laga Parties' contention that the district court's findings of fact and conclusions of law were "erroneous." Pet. App. 14a n.7. The court of appeals rejected this argument:

> The basis for many of these arguments is the District Court's decision not to hold a full evidentiary hearing, which we have addressed above. We find these attacks baseless, especially given the Laga Parties' failure to offer their own independent evidence to contradict the volumes of evidence submitted by the Settling Parties.

Id.

After the court of appeals entered its opinion on April 8, 2003, the Laga Parties on April 21, 2003 filed a motion for extension of time to file a petition for rehearing by panel only ("Extension Motion"). In paragraph 4 of the Extension Motion, the Laga Parties expressly stated that their "anticipated petition for rehearing would not seek reconsideration of [the court of appeals'] affirmation of the lower court's decision to approve the CERCLA settlement between appellees." In fact, they asserted that they did "not intend to seek

any stay and the petition for rehearing would not seek to hinder appellees' completion of their settlement. Accordingly, granting this motion would entail no prejudice to appellees." *Id.* Finally, they represented to the court of appeals that their "petition for rehearing would narrowly target that portion of the panel's decision which approved the lower court's entry of extensive factual findings (and legal conclusions) and the procedures leading thereto." *Id.* at ¶ 5. After the court of appeals granted the Extension Motion on April 25, 2003, the Laga Parties filed their petition for panel rehearing on May 5, 2003 ("Rehearing Petition"). In that petition (at 1), the Laga Parties expressly stated that they did "not seek reconsideration of the panel's affirmance of the district court's approval of appellees' settlement[.]" Instead, they expressed concern that "the panel may not fully have appreciated, however, [that] this Court's affirmance of the district court's entry of 'findings of fact and conclusions of law' carries with it consequences unfair to appellants (and others) unrelated to the consent decree approval *per se*." *Id.* The panel unanimously denied the Laga Parties' Rehearing Petition by Order dated May 21, 2003.

ARGUMENT

In their Petition seeking this Court's review, the Laga Parties expressly concede that they do not challenge the lower courts' only official judgment below, *i.e.*, the approval of the CERCLA consent decree. Rather they focus their attack on what the district court characterized as its "findings of fact." The Laga Parties press this appeal because they are concerned about what *may* happen in future proceedings in the NRD Action where the Trustee *may* seek to use the findings against the Laga Parties. As the court of appeals recognized below, any such concern is not ripe for determination. If and when the Trustee seeks to use those findings in the NRD Action, the Laga Parties may then raise this issue.

Moreover, as set forth below, the court of appeals applied the proper standard of review in affirming the district court's approval of the Consent Decree so there is no conflict among the Circuits as the Laga Parties erroneously contend. In addition, the court of appeals properly rejected as baseless the Laga Parties' "fact bound" argument that the district court's findings were erroneous.

I. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW IN AFFIRMING THE DISTRICT COURT'S APPROVAL OF THE CERCLA CONSENT DECREE.

The court of appeals properly applied an abuse of discretion standard of review in its consideration of the two primary issues presented by the Laga Parties' appeal: (1) whether the district court erred in holding that the CERCLA consent decree was fair, reasonable, and consistent with the public interest; and (2) whether the district court erred in failing to conduct a full evidentiary hearing. In an effort to suggest the existence of a conflict among the Circuits, the Laga Parties mischaracterize the court of appeals' ruling as announcing a new standard of review applicable to the review of a district court's entry of its factual findings and conclusions of law. The court of appeals, however, announced no new standard of review, but rather properly applied an abuse of discretion standard in its affirmation of the district court's approval of the Consent Decree.[5]

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[5] As set forth below, the district court's provision of a detailed explanation of the basis for its exercise of discretion to approve the Consent Decree does not render its ruling subject to a more rigorous standard of review on appeal.

After briefly reviewing the procedural history before the district court, the court of appeals began its legal discussion by summarizing the Laga Parties' appeal as follows:

> This appeal presents two questions. First, was the District Court's approval of the consent decree fair, reasonable, and in the public interest? Second, did the District Court err by approving the consent decree without holding a full evidentiary hearing?

Pet. App. 5a.

The court of appeals addressed the first question in Section II of its opinion. Pet. App. 5a-11a. In doing so, the court of appeals noted that it had only "recently had occasion to consider judicial approvals of consent decrees in CERCLA actions. *United States v. SEPTA*, 235 F.3d 817, 822 (3d Cir. 2000)." Pet. App. 6a.[6] The court of appeals quoted from its prior decision in *SEPTA* to address the appropriate standard of review on this question:

> We approach our task mindful that, on appeal, a district court's approval of a consent decree in CERCLA litigation is encased in a double layer of swaddling. The first layer is the deference the district court owes to [the] EPA's expertise and to the law's policy of encouraging settlement; the second layer is the deference we owe to the district court's discretion. Thus, [a litigant] is faced with a heavy burden in its attempt to persuade us that the district court abused its discretion by approving the consent decree.

Pet. App. 6a-7a.[7] At the conclusion of Section II of its opinion, the court of appeals applied the proper standard and

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[6] Indeed, the Laga Parties concede that the standard for determining a motion to approve a CERCLA consent decree is "well-settled." Petition at 12 n.8.

[7] Indeed, the Laga Parties recognized the applicability of the abuse of discretion standard on this issue in their brief below. Brief for Appellants, at 3.

unanimously concluded: "We see no abuse of discretion." Pet. App. 11a.[8]

The court of appeals addressed the second question in Section III of its opinion. Pet. App. 11a-14a. In considering whether the district court erred by approving the Consent Decree without holding a full evidentiary hearing, the court of appeals ruled that "[t]he Constitution does not require the court to conduct a full and formal evidentiary hearing to satisfy due process concerns." Pet. App. 12a. In support of that ruling, the court of appeals cited *BP Amoco Oil*, 277 F.3d at 1017, to the effect that "[i]t is within the sound discretion of the trial court to decide whether an evidentiary hearing is necessary before ruling on a proposed consent decree." Pet. App. 12a. In *BP Amoco Oil*, 277 F.3d at 1017, the Court of Appeals for the Eighth Circuit expressly stated that "[w]e review the district court's denial of [the appellant's] request for an evidentiary hearing for an abuse of discretion." *See also United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997); *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992); and *Cannons*, 899 F.2d at 93-94. At the end of Section III, correctly applying the abuse of discretion standard to the second issue raised by the Laga Parties in their appeal, the court of appeals unanimously concluded: "We find no abuse of discretion." Pet. App. 14a.

The foregoing review of the analytical structure of the court of appeals' analysis demonstrates that the court of appeals applied an abuse of discretion standard throughout its opinion unanimously affirming the district court's approval of the Consent Decree. The Laga Parties focus on one sentence in the court of appeals' opinion to suggest that the court of

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[8] In the current Petition and in their Rehearing Petition below, the Laga Parties abandoned their challenge to the district court's approval of the Consent Decree as fair, reasonable, and consistent with the public interest.

appeals "announced" a "new, non-evidentiary standard" that "findings of fact may be entered when they are 'fair, reasonable and consistent with the public interest' without reference to which evidence, if any, supports them[.]" Petition at 4 (quoting the court of appeals' opinion only in part and out of context). The court of appeals' opinion announced no new standard, but rather ruled that the district court did not abuse its discretion in approving the Consent Decree, particularly given that the Settling Parties supported their Joint Motion with an exhaustive documentary record and the Laga Parties provided no record to support their opposition.

In addition to mischaracterizing the standard applied by the court of appeals in affirming the approval of the Consent Decree, the Laga Parties also argue that the court of appeals should have applied a clearly erroneous standard to its review of the district court's factual findings. In doing so, the Laga Parties cite inapposite precedent relating to the review of findings of fact in other contexts and fail to cite any precedent where an appellate court has applied a clearly erroneous standard when reviewing the judicial approval of a CERCLA consent decree.

The Laga Parties cite four cases which they characterize as supporting the proposition that "[w]hen reviewing findings of fact in the context of a consent decree, the standard for review followed by all other circuits is 'clearly erroneous[.]'" Petition at 4 n.2; *see also id.* at 15 n.13. However, none of these cases support the Laga Parties' contention that an appellate court reviewing a judicial approval of a CERCLA consent decree should apply a clearly erroneous standard, rather than an abuse of discretion standard, to the findings underlying the court's exercise of its discretion to approve the consent decree if it is fair, reasonable, and consistent with the public interest.

The Laga Parties first cite *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). However, in that case, the Court of Appeals

for the Ninth Circuit did not review a judicial approval of a CERCLA consent decree; rather, it reviewed the district court's approval of a class action settlement before class certification under Federal Rule of Civil Procedure 23(e). *Id.* at 953-55.

Although the other three cases cited by the Laga Parties for their proposition did involve CERCLA consent decrees in some manner, they do not support their position here. The Laga Parties cite *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001). However, they do not cite that portion of the *Davis* opinion addressing the non-settlors' challenge to the CERCLA consent decree, in which the court of appeals applied the same abuse of discretion standard applied by the court of appeals below in rejecting the non-settlors' challenge to the consent decree. *Davis*, 261 F.3d at 21-28.[9] There is no suggestion whatsoever that the court of appeals in *Davis* applied a clearly erroneous standard to its review of the rationale supporting the district court's approval of the CERCLA consent decree. The Laga Parties instead cite to that portion of the *Davis* opinion which addressed certain parties' objections to the district court's declaratory judgment ruling. Petition at 4 n.2 and 15 n.13 (citing *Davis*, 261 F.3d at 37). At that portion of its opinion, the court of appeals in *Davis* did apply a clearly erroneous standard to findings of fact entered pursuant to Federal Rule of Civil Procedure 52(a) after a 26-day bench trial. *Davis*, 261 F.3d at 18 and 37. *See also id.* at 31 (identifying the clearly erroneous standard

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[9] In *Davis*, 261 F.3d at 21, quoting *Charles George*, 34 F.3d at 1085, the court of appeals observed as follows:

> Because an appellate court ordinarily cannot rival a district court's mastery of a factually complex case—a mastery often, as in this instance, acquired through painstaking involvement over many years—the district court's views must also be accorded considerable respect.

applicable to factual findings entered after trial).[10] No bench trial involving the Laga Parties was held below.[11] No declaratory judgment against the Laga Parties was entered below.[12]

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[10] The court of appeals in *Davis* cited its prior decision in *Dedham Water Co. v. Cumberland Farms Dairy*, 972 F.2d 453, 457 (1st Cir. 1992), in support of this standard. In *Dedham Water*, the court of appeals expressly stated "[w]hen a district court makes findings of fact *in a bench trial*, the clear-error standard pertains." *Id.* (emphasis added).

[11] The Laga Parties confuse the issue by asserting that the district court must have stated its findings of fact pursuant to Rule 52(a) or Rule 56 of the Federal Rules of Civil Procedure, and that the proper standard of review must be guided by whether the court issues them under one rule or the other. *See, e.g.*, Petition at 13 and n.11; and 15 and n.13. However, the district court did not set forth its findings of fact after hearing evidence in a bench trial or in the context of granting or refusing an interlocutory injunction, the two contexts in which Rule 52(a) applies. Nor did the district court set forth its findings in the context of determining a motion for summary judgment under Rule 56. For that reason, the numerous arguments made by the Laga Parties on that flawed premise are irrelevant.

[12] The district court set forth its findings of fact in the context of explaining its reasoning for exercising its discretion to approve the CERCLA consent decree as fair, reasonable, and in the public interest. Although the district court certainly could have set forth its reasoning for approving the Consent Decree without setting forth express "findings of fact" as it did, the form in which it expressed its rationale does not somehow alter the deferential standard of review accorded to the district court's approval of a CERCLA consent decree. Similarly, the district court's use of the term "conclusions of law" to characterize its legal basis for exercising its discretion to approve the CERCLA consent decree here does not subject it to a more exacting standard of review. The cases cited by the Laga Parties (Petition at 22) do not suggest otherwise. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (addressing the distinction between findings of fact under Federal Rule of Civil Procedure 52(a) and conclusions of law in appeal pursuant to Title VII of the Civil Rights Act of 1964); and *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 208 (3d Cir. 2001) (reviewing findings of fact and conclusions of law after a non-jury trial under ERISA).

The Laga Parties similarly mischaracterize the decision in *United States v. Colorado & Eastern R. R.*, 50 F.3d 1530, 1538 (10th Cir. 1995). Petition at 4 n.2 and 15 n.13. As in *Davis*, the court of appeals in *Colorado & Eastern* addressed appellants' challenge to findings of fact entered pursuant to Rule 52(a) after a bench trial of a CERCLA contribution claim, not as part of its approval of a consent decree. *Colorado & Eastern*, 50 F.3d at 1534 and 1538.[13]

The final case cited by the Laga Parties for this key proposition is *United States v. Montrose Chem. Corp. of California*, 50 F.3d 741, 746 (9th Cir. 1995). Unlike those portions of the *Davis* and *Colorado & Eastern* opinions cited by the Laga Parties, the *Montrose* opinion did involve an appellate court's review of the judicial approval of a CERCLA consent decree. However, the Court of Appeals for the Ninth Circuit recognized the same standard for assessing whether to approve a CERCLA consent decree and the same abuse of discretion standard of review on appeal as did the court of appeals below. *Montrose*, 50 F.3d at 746. In discussing the abuse of discretion standard of review applicable in that context, the court of appeals stated:

> *Under the abuse of discretion standard*, we cannot reverse unless we are convinced that the court below committed a clear error of judgment by failing to apply the correct law or by resting its decision on a clearly erroneous finding of material fact.

Id. at 746 (emphasis added).[14]

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[13] No portion of the *Colorado & Eastern* decision involved the appellate court's review of the judicial approval of a CERCLA consent decree.

[14] The reference to a "clearly erroneous finding of material fact" was in the context of describing the abuse of discretion standard, not as a wholly separate standard of review as the Laga Parties suggest. Moreover, given the Laga Parties' characterization of the district court's findings of fact

In *Montrose*, *id.* at 747-48, the court of appeals recognized that it "tread relatively uncharted territory in the area of Superfund litigation" by "holding that the district court erred in approving the proposed consent decree," but it did so applying an abuse of discretion standard, and only because it found that the proponent of the consent decree had provided the district court with no evidence at all upon which the district court could have based its evaluation of a critical aspect of the fairness of the consent decree. *Id.* at 746-47. The *Montrose* court explained:

> Notwithstanding this "swaddling," there is a fundamental difference in the review of the sufficiency of evidence to support a settlement and the situation where there is no evidence at all on an important point. There is, in fact, no evidence on this record from which the district court could have made any determination with respect to estimates of responsibility and damage. It is clear a district court may *abuse its discretion* by having no evidence to support its decision. [Citation omitted.]

Id. (emphasis added).[15]

Contrary to the Laga Parties' assertion that the *Montrose* opinion supports the applicability of a different standard of review on appeal, that opinion actually confirms the applicability of an abuse of discretion standard, as applied by the court of appeals below. The critical difference between this case and the situation in *Montrose* is that the proponents of the CERCLA consent decree here, mindful of the prior

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and conclusions of law as "irrelevant to the approval of the consent decree" (Petition at i), they can hardly be heard to assert that those findings of fact were material facts in the district court's ruling.

[15] The court of appeals in *Montrose* explained that in the context of "an informational vacuum"—where the government provided no evidence of its estimate of total natural resource damages —that the district court could not have assessed whether the consent decree was fair and reasonable. *Id.* at 747.

precedent in *Montrose*, made a substantial effort to provide the record support for the district court's assessment of the fairness and reasonableness of the CERCLA Consent Decree by submitting a two-volume Appendix gathered from the fruits of a decade-long investigation of the Tutu Site and submitting to the Court the estimate of the natural resource damages proposed by "one of two nationally known firms that performs these assessments." *See, e.g.*, Pet. App. 3a-4a.[16]

Contrary to the Laga Parties' mischaracterization of the court of appeals' opinion below, the court of appeals announced no new standard of review, but rather properly applied an abuse of discretion standard to the Laga Parties' challenge to the district court's approval of the CERCLA consent decree. Thus, there is no conflict with the precedent of other Circuits and no basis for this Court to grant review.

II. THE COURT OF APPEALS PROPERLY REJECTED AS BASELESS PETITIONERS' ARGUMENT THAT THE DISTRICT COURT'S FINDINGS WERE ERRONEOUS.

Not only did the court of appeals apply the proper standard of review in affirming the district court's approval of the Consent Decree, but it also correctly rejected as baseless the Laga Parties' challenge that the district court's findings of fact were erroneous. Moreover, even if there were any validity to the Laga Parties' argument in this regard (and there is not), the "fact bound" nature of the Laga Parties' challenge to the district court's rather detailed findings of fact does not support the Laga Parties' request that this Court grant review of the decision below.

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[16] As noted above, the Settling Parties also referenced an additional eight volumes of evidence previously submitted to the district court in connection with other pending motions in the CERCLA Action.

The court of appeals accurately described the extensive record submitted by the Settling Parties in support of their joint motion for approval of their CERCLA consent decree:

> In support of their joint motion to the District Court, the Settling Parties filed a two-volume appendix, including the consent decree and various EPA and other expert reports. The Trustee retained Industrial Economics to conduct a damage assessment, one of the two nationally known firms that performs these assessments. *Comm'r of the DPNR v. Esso Standard Oil*, Civ. No. 1998-206, at 20 (D.V.I. filed Oct. 15, 2001). The assessment here examined two types of losses: "use related loss" represented the cost to rehabilitate the contaminated portions of the Tutu aquifer; and "non-use related loss" assessed the lost value to the public from non-use of the aquifer. Industrial Economics calculated the use related loss at $16.9 million and estimated the non-use related loss at approximately $19 million. Its work was peer-reviewed by Dr. Raymond J. Kopp, a senior fellow at Resources for the Future, and Dr. Kevin J. Boyle, a professor of environmental economics at the University of Maine.

Pet. App. 3a-4a. *See also* Pet. App. at 12a ("The Settling Parties produced an extensive documentary record to support their joint motion. The record included exhibits, expert reports, and deposition testimony detailing the fruits of more than a decade of environmental investigation at the Tutu site.").

The court of appeals also emphasized that "the Laga Parties offered no factual or documentary support for their arguments before the District Court. They elected not to offer any expert witnesses and submitted no expert reports to challenge those submitted by the Settling Parties. While they provide express references to deposition testimony to this court on appeal, they failed to do so before the District Court." Pet. App. 8a. *See also* Pet. App. 12a ("In contrast, the Laga Parties presented no competing documents, testi-

mony, or analysis. They merely contested the Settling Parties' evidence as insufficient and replete with errors."); and Pet. App. 13a ("the Laga Parties failed to submit deposition testimony, expert reports, or analysis to support their criticism of the Settling Parties' evidence, and were afforded ample opportunity to be heard prior to and on February 14, 2001").

In view of the voluminous record submitted by the Settling Parties and the Laga Parties' failure to provide any record in opposition, the court of appeals tersely, yet appropriately, dismissed the Laga Parties' contention that the factual findings were "erroneous" and held that such attacks were "baseless." Pet. App. 14a n.7.[17]

Once the court of appeals unanimously affirmed the district court's approval of the Consent Decree, the Laga Parties abandoned their challenge to said approval. *See* April 21, 2003 Extension Motion, ¶ 4 ("The anticipated petition for rehearing would not seek reconsideration of [the court of appeals'] affirmation of the lower court's decision to approve the CERCLA settlement between appellees. Appellants do not intend to seek any stay and the petition for rehearing would not seek to hinder appellees' completion of their settlement"); May 5, 2003 Rehearing Petition, at 2 (the Laga Parties "do not seek reconsideration of the panel's affirmance of the district court's approval of appellees' settlement"); and August 19, 2003 Petition, at 1 ("Petitioners do not here contest the approval of the consent decree"). *See also*

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[17] In footnote 7 of its opinion, the court of appeals stated in full:

> The Laga Parties also attack specifically a number of findings of fact as being unsupported or contradicted by record evidence, and a number of conclusions of law as being erroneous. The basis for many of these arguments is the District Court's decision not to hold a full evidentiary hearing, which we have addressed above. We find these attacks baseless, especially given the Laga Parties' failure to offer their own independent evidence to contradict the volumes of evidence submitted by the Settling Parties.

Petition, at 22 (where the Laga Parties' ultimate request for relief does not seek reversal of the lower courts' approval of the consent decree, but rather only seeks to have the underlying findings of fact and conclusions of law vacated).

The Laga Parties' candid admission that they do not seek to undo the lower courts' approval of the Consent Decree here confirms the "fact bound" nature of their appeal. Even if this Court granted the Laga Parties' Petition, and even if it ultimately ruled in favor of the Laga Parties, the lower courts' approval of the Consent Decree would remain undisturbed. The rationale for Supreme Court Rule 10's express statement that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings" is well illustrated here. After all, why should this Court expend its limited resources to evaluate an appeal where the ultimate relief would never alter the lower courts' approval of the Consent Decree?[18]

Nor does the Laga Parties' purported concern about the potential adverse effect of the district court's findings of fact in subsequent proceedings support their request for review by this Court. First, the Laga Parties do not even assert that the findings would certainly have preclusive effect in subsequent proceedings. Instead, they hedge their argument on this point. *See, e.g.*, Petition at 1 ("which have *potentially* continuing effect on the remaining issues in the NRD Action"), 10 (which "*could* impact directly on all future proceedings in the NRD Action"), and 20 (the trial court "*may* be inclined or even compelled to rule in accordance with his existing and outstanding opinion") (empha-

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[18] *See also Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (recognizing that this Court generally does not "grant a certiorari to review evidence and discuss specific facts"); and *Vasquez v. United States*, 454 U.S. 975, 977 (1981) (it is "appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases").

sis added).[19] Second, as noted by the court of appeals, "[w]hether the court's findings have a preclusive effect against the Laga Parties [in the CERCLA and NRD Actions] only becomes ripe for determination if and when the Settling Parties use the findings and conclusions in other contexts." Pet. App. 13a n.5.[20] The hypothetical use of the findings and conclusions in subsequent proceedings in the NRD Action is not ripe for review by this Court and cannot justify the Laga Parties' effort to obtain this Court's review of this issue.

Therefore, this Court should not grant the Laga Parties' "fact bound" challenge to purportedly erroneous findings, particularly where even a successful appeal would not alter the lower courts' approval of the CERCLA consent decree and where any potential use of the findings is hypothetical at best and clearly not ripe for determination.

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[19] In fact, the Laga Parties note that the trial court denied summary judgment motions in the CERCLA Action at the same time it approved the CERCLA consent decree. The trial court apparently did not feel compelled to extend its findings set forth in the context of approving the CERCLA consent decree to the Rule 56 motions pending at the very same time.

[20] As noted by the Laga Parties in their Petition (ii-iii), the Laga Parties and the Esso and Texaco parties settled their claims in the CERCLA Action during the pendency of the appeal below so it is clear that the findings and conclusions will never be used in that proceeding.

CONCLUSION

The Laga Parties' Petition should be denied.

Respectfully submitted,

IVER STRIDIRON
Attorney General
Territory of the U.S. Virgin Islands
U.S.V.I. Department of Justice
48B-50C Kronprindsens Gade
GERS Complex
Charlotte Amalie,
St. Thomas, USVI 00802

Counsel for Trustee

KELL M. DAMSGAARD
Counsel of Record
GLEN R. STUART
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103

Counsel for Esso Virgin Islands, Inc., Esso Standard Oil Co. (Puerto Rico) and Esso Standard Oil S.A. Ltd.

H. MARC TEPPER
BUCHANAN INGERSOLL
11 Penn Center, 14th Floor
1835 Market Street
Philadelphia, PA 19103

Counsel for the Virgin Islands Department of Education

JOHN K. DEMA
Law Offices of John K. Dema, P.C.
1236 Strand Street, Suite 103
Christiansted,
St. Croix, USVI 00820

Counsel for Trustee

DONALD W. STEVER
DEWEY BALLANTINE LLP
1301 Avenue of the Americas
New York, NY 10019

Counsel for Texaco Caribbean, Inc., Texaco Puerto Rico, Inc. and Texaco, Inc.

JOHN A. ZEBEDEE
HYMES & ZEBEDEE, P.C.
No. 10 Norre Gade, 3rd Floor
Charlotte Amalie,
St. Thomas, USVI 00804

Counsel for Vernon Morgan

DAVID A. BORNN
THE BORNN LAW FIRM, P.L.L.C.
No. 8 Norre Gade
2nd Floor
St. Thomas, USVI 00802

Counsel for Virgin Islands Housing Authority